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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902. 1903.

No. 615. 222

FREDERICK J. SCHICK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED FEBRUARY 24, 1903.

(18,843.)

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1 Pleas had at a regular term of the district court of the United States for the northern division of the northern district of Illinois, begun and held at the United States court-rooms, in the city of Chicago, in said division of said district, on the third Monday of December (it being the fifteenth day thereof), in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred — twenty-seventh year.

Present: The Honorable Christian C. Kohlsaat, judge of said court and the Honorable J. Otis Humphrey, judge of the district court of the United States for the southern district of Illinois, sitting in this court by designation, presiding, John C. Ames, marshal for the northern district of Illinois, and T. C. MacMillan clerk of the district court of the United States for the northern district of Illinois.

2 THE UNITED STATES
vs. } 3417.
FREDERICK J. SCHICK.

Be it remembered that heretofore to wit on the 22nd day of January, A. D. 1903, it being one of the days of the December term of the district court of the United States for the northern division of the northern district of Illinois, begun and held in the United States court-rooms in the city of Chicago, in said division of said district on the third Monday of December, it being the fifteenth day thereof in the year of our Lord one thousand nine hundred and two and of the Independence of the United States of America the one hundred and twenty-seventh year before the Honorable Christian C. Kohlsaat, judge of said court, presiding, the following order was had and entered of record in said cause, to wit:

3 THE UNITED STATES
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FREDERICK J. SCHICK.

Comes S. H. Bethea, Esq., district attorney and presents the affidavit of Joseph A. Painter and a criminal information against Frederick J. Schick based thereon and asks leave of the court to file the same; whereupon it is ordered by the court that said affidavit and information be filed and the cause placed upon the dockets of this court.

And afterwards to wit on the 22nd day of January, A. D. 1903, said affidavit was filed, the same being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

NORTHERN DISTRICT OF ILLINOIS, *Northern Division,* } *ss.:*

Joseph A. Painter being first duly sworn, on oath, deposes and says that he resides in the city of Chicago, Illinois; that he is a deputy internal-revenue collector in and for the first internal-revenue collection district of Illinois; that on, to wit, the 22nd day of December, A. D. 1902, Frederick J. Schick in the city of Chicago, in the division and district aforesaid, in the first internal-revenue collection district of Illinois, was a retail dealer in oleomargarine; that the said Frederick J. Schick at the time and place aforesaid, so being such retail dealer in oleomargarine, unlawfully did knowingly purchase and receive for sale certain oleomargarine which had not been stamped according to law,
4 that is to say, ten pounds of a mixture and compound composed, as he the said Frederick J. Schick, then and there well knew, of oleo oil, neutral lard, cream, common salt, and Wells-Richardson's improved butter color; that said last-named ingredient, to wit, Wells-Richardson's improved butter color, produced an artificial coloration in the said oleomargarine that caused it to look like butter of a shade of yellow; that said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid, by Wm. J. Moxley, a corporation organized and existing under and by virtue of the laws of the State of Illinois; that said oleomargarine was then and there purchased and received for sale by the said Frederick J. Schick as aforesaid from the said Wm. J. Moxley, a corporation as aforesaid; and that when said oleomargarine was purchased and received for sale as aforesaid, it was contained in a new wooden original manufacturer's package to which, as the said Frederick J. Schick, then and there well knew, no coupon, stamp or stamps in the sum of ten cents for each pound of oleomargarine so contained therein had then and there been or was affixed by the said manufacturer, or by any other person, for denoting the payment of the internal-revenue tax on the oleomargarine so contained therein.

The said Joseph A. Painter therefore prays that the said Frederick J. Schick may be apprehended and held to answer said charge and to be further dealt with according to law.

Dated this 23rd day of December, A. D. 1902.

JOSEPH A. PAINTER.

Subscribed and sworn to before me this 23rd day of December, A. D. 1902.

CHAS. A. BUELL,
Deputy Clerk U. S. Dist. Court, Northern Dist. of Illinois.

Endorsed: U. S. district court for the N. dist. of Ills., N. div. No. 3417. The United States *vs.* Frederick J. Schick. Affidavit. Filed Jan. 22, 1903, at 2 o'clock p. m. T. C. MacMillan, clerk. (B.)

5 And afterwards, to wit, on the 22d day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a criminal information, the same being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the December Term, in the Year of Our Lord Nineteen Hundred and Two.

NORTHERN DISTRICT OF ILLINOIS, } *ss.:*
Northern Division, }

Be it remembered, that S. H. Bethea, attorney of the United States of America for the northern district of Illinois, who for the said United States in this behalf prosecutes, in his own person comes here into the district court of the said United States for the division and district aforesaid, on this twenty-second day of January, in this same term, and for the said United States gives the court here to understand and be informed, that Frederick J. Schick, late of the city of Chicago, in the said division and district, on the twenty-second day of December, in the year of our Lord nineteen hundred and two, at Chicago aforesaid, in the division and district aforesaid and in the first internal-revenue collection district of Illinois, was a retail dealer in oleomargarine; and that the said Frederick J. Schick then and there, so being such retail dealer in oleomargarine, unlawfully did knowingly purchase and receive for sale certain oleomargarine which had not been stamp*t* according to law,—that is to say, ten pounds of a mixture and compound composed, as he the said Frederick J. Schick well knew, of oleo oil, neutral lard, cream, common salt, and Wells-Richardson's improved butter color, (which said last-named ingredient, to wit, Wells-Richardson's improved butter color, produced an artificial coloration in the said oleomargarine that caused it to look like butter of a
6 shade of yellow), which said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid by William J. Moxley, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and then and there was purchased and received for sale by the said Frederick J. Schick as aforesaid from the said William J. Moxley, a corporation as aforesaid, and, when so as aforesaid purchased and received for sale, was contained in a new wooden original manufacturer's package to which, as he, the said Frederick J. Schick then and there well knew, no coupon stamp or stamps, in the sum of ten cents for each pound of oleomargarine so contained therein, then and there had been or was affixed by the said manufacturer, or by any other person, for denoting the payment of the internal-revenue tax on the oleomargarine so contained therein; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Whereupon the said attorney of the said United States who prosecutes as aforesaid for the said United States prays the consideration

of the court here in the premises, and that due process of law may be awarded against him, the said Frederick J. Schick, in this behalf, to make him, answer to the said United States concerning the premises aforesaid.

S. H. BETHEA,
United States Attorney.

Endorsed: No. 3417. U. S. district court for the N. dist. of Ills., N. div. The United States *vs.* Frederick J. Schick. Information on sec. 11, act of Aug. 2, 1886, as amended by sec. 3, act of May 9, 1902 internal-revenue laws. Filed in open court Jan. 22, 1903 at 2 o'clock p. m. T. C. MacMillan, clerk. S. H. Bethea, U. S. att'y N. dist. Ill.

7 And afterwards, to wit, on the 22nd day of January, A. D. 1903, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, judge, to wit:

THE UNITED STATES
vs. } 3417.
FREDERICK J. SCHICK.

Comes the United States by S. H. Bethea, Esq., district attorney,, comes also the defendant Frederick J. Schick, in his own proper person as well as by counsel and said defendant being arraigned upon the information filed herein against him pleads not guilty thereto and the parties having waived the intervention of a jury, the cause is submitted to the court for trial, whereupon, after the hearing by the court of the evidence by the parties adduced and arguments of counsel, the said defendant by his attorney moves the court to find the defendant not guilty, which said motion is by the court overruled and denied, to which ruling of the court said defendant by his attorney duly excepts. Thereupon the court being fully advised in the premises finds the defendant —— —— guilty as charged in the information. Thereupon the defendant by his attorney enters his motion for a new trial herein which said motion after hearing of arguments and due consideration by the court is overruled and denied, and thereupon said defendant by his attorney enters his motion in arrest of judgment which motion in arrest after hearing of arguments and due consideration by the court is overruled and denied, and said defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered by the court and as the sentence and judgment of the court upon the finding of guilty herein as aforesaid that the defendant Frederick J. Schick forfeit and pay to the United States a fine in the sum of fifty dollars besides the costs in this behalf expended, and that execution shall issue therefor.

8 And afterwards, to wit, on the 27th of January, A. D. 1903, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, judge, to wit:

THE UNITED STATES
vs. } 3417.
FREDERICK J. SCHICK.

Come the parties by their attorneys and on their motion it is ordered by the court that leave be and it hereby is given said defendant to file his waiver of jury, motion to find defendant not guilty, and motion for a new trial herein, *nunc pro tunc* as of January 22, 1903.

And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court, in the above-entitled cause, a waiver of jury trial, the same being in the words and figures following, to wit:

9 UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } *ss:*

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs. } Information.
FREDERICK J. SCHICK.

Waiver of Jury Trial.

Now, come the respective parties and, by their counsel, waive a trial by jury herein and agree to submit the issues herein to the court.

Dated January 22, 1903.

S. H. BETHEA,
For the Government.
WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
For the Defendant.

Endorsed: District court of U. S. Northern district of Ill. northern division. Waiver of jury trial. United States of America *vs.* Frederick J. Schick. Gen. No. 3417. Filed by leave of court Jan. 27, 1903, at 10 o'clock a. m. T. C. MacMillan, clerk. *Nunc pro tunc* Jan. 22, 1903.

10 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a motion to find the defendant not guilty, the same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division.

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
FREDERICK J. SCHICK. } Information.

Motion to Find the Defendant Not Guilty.

Comes now the defendant, by his counsel, and, upon the evidence before the court, moves the court to find in favor of the defendant and render a verdict and judgment of not guilty, and discharge the defendant, because the actof Congress of May 9th, 1902, which is an amendment to the act of Congress of August 2nd, 1886, relating to butter and oleomargarine, in so far as it imposes a tax of eight cents per pound in addition to the tax imposed by the said act of August 2, 1886, upon oleomargarine containing "artificial coloration that causes it to look like butter of any shade of yellow," is in contravention of the Constitution of the United States and of the
11 amendments thereto and is illegal and void, for the following reasons, to wit:

First. The act deprives the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law;

Second. The act is an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States;

Third. The act so arbitrarily discriminated against oleomargarine in favor of butter as to be repugnant to those fundamental principles of equality and justice which are inherent in the Constitution of the United States.

Dated January 22, 1903.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendants.

Endorsed: U. S. district court, northern district of Ill., northern division. Motion to find the defendant not guilty. United States of America *vs.* Frederick J. Schick. Gen. No. 3417. Filed by leave of court Jan. 27, A. D. 1903, at 10 o'clock a. m. T. C. MacMillan, clerk. *Nunc pro tunc* Jan. 22, 1903.

12 And afterwards, to wit, on the 22nd day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a motion for a new trial, same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } *ss:*

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
FREDERICK J. SCHICK. } 3417. Information.

Motion for New Trial.

Now comes the defendant and moves the court to set aside the finding of guilty herein and to grant a new trial of said cause for the following reasons, to wit:

(1.) The finding is contrary to the evidence.

(2.) The finding is contrary to the law.

(3.) The court struck out and refused to consider proper evidence offered and received on behalf of the defendant.

Dated January 22nd, 1903.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Endorsed: District court of U. S., northern district of Ill., northern division. Motion for new trial. United States of America *vs.* Frederick J. Schick. Gen. No. 3417. Filed by leave of court Jan. 27, 1903 at 10 o'clock a. m. T. C. MacMillan, clerk. *Nunc pro tunc*, Jan. 22, 1903.

13 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a bill of exceptions, said bill of exceptions being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } *ss:*

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
FREDERICK J. SCHICK. } 3417. Information.

Bill of Exceptions.

Be it remembered that the above-entitled cause, coming on for trial on the 22nd day of January, A. D. 1903, the same being one of the days of the regular December term of said court for 1902, before the Honorable Christian C. Kohlsaat, judge of said court the Government appearing by its counsel, Solomon H. Bethea and Oliver E

Pagin, and the defendant appearing in person and by his counsel William D. Guthrie, Francis J. Kearful, Charles C. Carnahan and Delavan B. Cole, the following proceedings were had:

Trial by jury was waived by a stipulation in writing duly signed and filed and the cause was submitted to the court.

14 Thereupon the Government to maintain the issues on its part, introduced the following evidence:

JOSEPH A. PAINTER, called and sworn as a witness on behalf of the Government, testified as follows:

My name is Joseph A. Painter. I am deputy collector of internal revenue, first district of Illinois, embracing the city of Chicago. I know the defendant, Frederick J. Schick. He is in the retail meat and butter business, and a retail dealer in oleomargarine at No. 50 Fifth avenue, Chicago. I called at his place of business on the 22nd day of December, 1902, and found this ten-pound package of oleomargarine on which a tax was paid at the rate of two cents per pound. It was packed and branded according to law. It had been manufactured in December, 1902, by William J. Moxley, incorporated, factory corner Clinton and Randolph streets, Chicago. The ingredients of that oleomargarine were oleo oil, neutral lard, cream, common salt and Wells-Richardson improved butter color. It is of a yellow color and looks like natural yellow butter. The defendant admitted at the time that he had just received the package for

15 sale knowing its character and ingredients and the amount of tax paid on it.

Mr. KEARFUL: You do not contend that he intended to sell it for butter, do you?

Mr. PAGIN: Oh, no.

Thereupon the Government rested.

Thereupon, the defendant to maintain the issues on his part, offered and introduced the following evidence:

ANDREW E. BERGLAND, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Andrew E. Bergland. I am employed by the Moxley Company as foreman and have been so employed for 18 years, about. I superintended the manufacture of the article just testified to by the internal-revenue collector, and can state the proportions of the ingredients contained in that article. There was 2 lbs. and 8 oz. of oleo oil; 4 lbs. and 7¾ oz. of neutral lard; 1 lb. and 12 oz. of cream; 1 lb. and 4 oz. of salt; and a quarter of an ounce of color, Wells-Richardson's improved butter color. That was according to a formula which is used in the course of business at

16 the factory. We call it special grade.

It is one of the high grades. It is designed to be used as a substitute for butter.

MARK DE LA FONTAINE, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Mark de la Fontaine. I am a chemist and have been a chemist nearly 50 years. I am familiar with the chemical properties of oleomargarine or butterine and butter.

(The ingredients of the article in question and their proportions as testified to by the previous witness were read to this witness as follows: 2 lbs. and 8 oz. of oleo oil; 4 lbs. and 7¾ oz. of neutral lard; 1 lb. and 12 oz. of cream; 1 lb. and 4 oz. of salt; and a quarter of an ounce of color, Wells-Richardson's improved butter color.)

I can state the difference between the chemical properties of the article manufactured according to the formula just read and pure creamery or dairy butter. Considering only the fat part alone the difference lies in this, that the creamery butter contains on an average about eight or nine per cent. of a mixture of butyrin and one or two others, caproin and caprin, in very small quanti-
ties, but essentially butyrin, which is almost seven per cent.,
17 whilst in oleomargarine or butterine made according to the process or formula given here, the proportion of butyrin is less, how much less depends upon the quantity of cream used. The cream is not a uniform article. Sometimes it contains more fat, sometimes less; consequently sometimes more butyrin, sometimes less. There is nothing at all in this difference which affects the wholesomeness of the article. These elements which are absent to some extent in oleomargarine in the process of nutrition play the same part as the remainder of the fat, that is, they are used mostly as fuels, they are burned out in the system and generate heat, and in that respect the properties or components that we speak of, butyrin and its first cousins, caproin and caprin, produce much less heat than the palmitin in butter.

There is a difference in the flavor on account of difference in the proportions of these components, because the flavor is largely due to butyrin and at the same time it is the butyrin which becomes rancid first, an action which has a tendency to make butter strong in flavor.

To some extent the smaller quantity of butyrin in oleomargarine is an advantage because it keeps fresh longer than butter. There are other things to consider with regard to butterine turning rancid. There is not so much curd of the cream or the milk and some fer-
ments to be worked out. With the exceptions named the
18 substances, oleomargarine and butter, are substantially similar. I don't know any difference between the palmitin, olein and stearin of butter and those of butterine or oleomargarine.

I am familiar with at least one butter color used for coloring butter and oleomargarine. It is extensively sold under the name of the Wells-Richardson improved butter color. It is a solution of a yellow coal-tar coloring matter in oil, generally cotton-seed oil. I have never found any statement that it is injurious. It is not on the list of the injurious colors. It is on the list of colors that are

permitted—that is, the use of which is allowed to confectioners as well as butter-makers. It is the same coloring matter which is universally used to color butter as well as oleomargarine. It has taken the place of annatto because it is cheaper and more desirable. It requires less of it to produce the same effect. There is nothing unwholesome about it. As I say, it is on the list of colors the use of which is allowed to butter-makers and confectioners.

Cross-examination by Mr. PAGIN:

There is no palm oil in this butter color. According to the amount used it will give to oleomargarine or butter a dark-yellow or orange or very pale-yellow color. It is simply a question of proportion or quantity.

Q. You speak of a list of prohibited or permitted colors; what do you mean by that list?

19 A. Well, some of the European governments have had the question of coal-tar colors and other colors investigated in regard to their being poisonous or not poisonous and therefore as to their being available or not for coloring articles of food. There was issued a list of the colors which are poisonous and therefore should not be used and another list of colors which are permitted. The list is recognized in this country.

Q. In the State of Illinois, under the pure-food law, is there any such list?

A. I don't know whether the pure-food law mentions any of the colors; but, for instance, you will find that list in Leffman & Beam on the Analysis of Food. Then a similar list is in the circular published by the National Association of Confectioners, or a name like that, an association like that which has branches all over the United States.

Mr. KEARFUL: We have other witnesses to the same facts.

Mr. BETHEA: Well, that is enough.

The COURT: You may consider them in to corroborate it.

Mr. BETHEA: Yes.

20 HENRY BOEHMER, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Henry Boehmer. I live at Barrington, Illinois. I am a manufacturer of creamery butter. I have been engaged in business at that place or other places about 25 or 26 years, as near as I can recollect.

Q. Look at the article involved in this case and state whether or not it corresponds in color to the ordinary color of creamery butter which is put out on the market in Chicago.

A. Why, I think it is as near as we could have it as creamery butter.

I am familiar with the business of manufacturing creamery butter generally throughout the western portion of the United States.

Q. Are you able to state the custom of butter manufacturers in regard to coloring butter throughout the year?

Mr. BETHEA: I object to that. It seems to me that it is entirely immaterial and irrelevant and incompetent.

The COURT: Yes, I do not think that is proper.

Mr. KEARFUL: It seems to me, your honor, that it is necessarily a part of our case; and, while your honor may differ with me, I would like to have this evidence in.

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Mr. BETHEA: Make your offer.

The COURT: The object is to show that there is artificial coloring matter used in the manufacture of butter; is that it?

Mr. KEARFUL: Well, it goes a little further than that. I want to state the proposition to the court. This case will have to turn upon the effect of this statute as it may be observed by the court in its operation; and if it is observed to operate so as to prevent the people of the country from obtaining oleomargarine in the way in which they want it, and to destroy the business of oleomargarine because the manufacturer cannot sell it to the people in the way in which they want it, that will be one branch of our contention that it is a discrimination which deprives these parties of their liberty and property without due process of law. Now, the fact being that whether it is butter or whether it is oleomargarine the people want it a uniform shade of color throughout the year, and they won't buy white butter or they won't buy white oleomargarine, and in the presence of that fact, Congress places such a tax upon one of those articles as to prevent its being used and sold. It is therefore necessary to show as an essential fact that oleomargarine and butter, one used as a substitute for the other, are commonly colored a uniform color throughout the year, because that is the demand of the consumers; and I want to say this, that if it should turn out that our contention is correct—if your honor should take the wrong view of this matter, as courts may do sometimes—it would only result in this case being sent back for further hearing in order to determine the facts upon that point.

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The COURT: I think you may make what showing you please, and then they may move to strike it out.

Mr. BETHEA: We do not care to have it go in, but we want our objection in where we think the evidence is improper.

It was agreed that it should be understood that the Government's counsel objected to this line of testimony from any witness and to any incompetent testimony, but that the questions should be asked and answered and that the right of the Government reserved in all cases to move to strike it out.

The WITNESS: I am familiar with the custom amongst butter manufacturers in regard to using coloring matter. It is used by manufacturers the year around. We call it a June color when we speak of it for butter, what is sold in Chicago, and, for instance, at Washington, Philadelphia, and so forth, it is what we call a June color. The sample involved in this case is just about as near to perfect June color as we can get. We buy the prepared color. We used to make our own color but now we buy it,

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what we call a butter color. It is a commercial article and there are different kinds. I am acquainted with the Wells-Richardson butter color. I should think the percentage of the amount used would be in favor of the Wells-Richardson. There are other colors used a great deal like Hanson's, and so forth.

Q. To what extent throughout the year is it colored?

A. Well, there is a difference. Different places require different colors, but as a general rule, what we call a June color. It is the color that we should give it. Grass would give that color to butter. That is why we call it June color.

Q. Do you try to obtain the color of June butter?

A. Yes. That is what we call the June color.

The COURT:

Q. Don't you color June butter also?

A. Yes sir, but not as much as perhaps butter made in December. That is the only difference.

Mr. KEARFUL:

Q. What is the natural color of butter in December and other months of the year when cattle do not get clover and grass?

—. At this time of the year and the time of the year when there is no grass, it is, you might say, white, or pretty near a perfect white.

Q. In the creamery business is there any demand for butter in its natural condition and with its natural color?

24 A. No, sir.

Q. Do you know whether there is any demand amongst butter manufacturers for uncolored butter?

A. Not that I know of. I don't think there is, because what I have seen is all colored.

Q. Have you any knowledge of the character of the butter to be found upon the tables throughout the United States?

A. Why, all the butter I have seen is colored, more or less. Different places have different colors sometimes; different sections of the country each has a uniform color that it demands.

Cross-examination by Mr. BETHEA:

Q. They do not color butter in the summer time when the cows are eating clover, do they?

A. Yes, sir.

Q. Why do they do that?

A. Why—I never made butter, or saw butter made at any time of the year but that comes to what we call the June color, they all color it some. But at that time of the year, perhaps they only use—oh, about a quarter, that is when there is clover or grass, of the amount that they use at this time of year.

Q. Doesn't clover make the butter naturally a butter color, a butter yellow?

25 A. It don't make it as high color as the people want it.

Q. Well, you do not mean to say that they do not use any

butter in the natural condition at any time of the year, that nobody uses it?

The COURT: In the market, he says.

Mr. BETHEA:

Q. In the market. What do you say about that?

A. Why, I do not think that there is one farmer out of a thousand that puts on the market the kind of butter we make but that is colored the year around.

Q. You do not mean to say that in the market there is no natural butter at any time of the year?

A. Why, there is natural butter, but it is colored.

Q. I mean with the natural butter color. Suppose it is June or July?

A. I do not think there is.

Q. Isn't there any butter sold anywhere in June or July that is not colored?

A. Not what we call the regular butter put on the market.

Q. Don't the farmers bring in butter and sell it?

A. I do not think they do very much. I think most of the farmers' butter is colored.

Q. What is the use of coloring it in the summer time when it is naturally the color that gives the reputation to butterine?

A. Because the people want the color, so we color it.

The COURT: So as to make a uniform color?

26 A. Yes sir, that is the aim of coloring.

Mr. BETHEA:

Q. You can remember, can't you, when butter was sold in its natural way?

A. Why, I do in the old country, but I do not remember in this country. I have lived in this country about thirty years.

Q. Now, aren't you mistaken about that?

A. No, I am not, because I have been in business twenty-six years, I think, twenty-five or twenty-six.

Q. Do you mean to say that thirty years ago that the people in this country, the farmers, people who produced butter, colored it in the summer time?

A. I do not say thirty years, but I say twenty-six, because I have been in the business twenty-five or twenty-six years.

Q. Well, this butter was a pretty good article that was not colored, wasn't it, in its natural condition?

A. Why, as far as taste, the article is all right.

Q. Yes, and looks? Take the summer butter, how could you improve on that, natural butter, where the cows have been eating grass and clover?

A. Why, it might be all right, it would be all right for me, because I would know what it was. But for the people that we sell it to, they would rather have the color.

Q. Why? Are they afraid it is oleomargarine if it is not colored?

A. Well, that I do not know.

Mr. KEARFUL: Does the idea of the uniformity of the butter which comes into the market have anything to do with coloring butter which is already naturally a butter color?

27 The COURT: He has answered that the object of coloring it is so as to make it uniform.

Mr. BETHEA: Yes, he stated that. Now, I move to strike out his testimony as being immaterial and irrelevant.

The COURT: Of course, as an abstract proposition, it is hard to see why there should be any difference between coloring oleomargarine and coloring butter, but I cannot see but that Congress, in the exercise of its police powers, for various purposes, among which might be the assistance in detecting the difference between butter and oleomargarine, and other purposes incident to the detection of oleomargarine to prevent imposition on the public——

Mr. KEARFUL: Pardon me one moment if your honor will.

The COURT: Yes.

Mr. KEARFUL: I suggest that ruling upon this objection might be reserved until the evidence is all in, when the matter can be argued and the points presented.

The COURT: Have you got more evidence on this point?

Mr. KEARFUL: Yes sir.

The COURT: I thought you were through. I think I am sufficiently advised on the point now, and will say that for the purpose of this hearing the testimony may be stricken out.

To which ruling of the court the defendant, by his counsel, then and there duly excepted, which exception was duly allowed.

28 ANDREW AMUNDSEN, a witness produced, sworn and examined on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Andrew Amundsen. I live at 1201 Milwaukee avenue. I am in the butter and butterine business. I started five or six years ago in butter, and I could not make any success of that, so I went into butterine, and I increased it, and I doubled it every year, up till July 1st, 1902, when I was selling 2,600 pounds a week, and when the law went into effect, there was an eruption throughout the whole trade. Every customer I had quit. They didn't want it. When I came around with white butterine, they would try it once and the next time I came around they met me in the door and said "We don't want any more of your lard." Then I tried with butter, and of course the majority of my trade now they take one pound of butterine for cooking purposes, while they take two or three pounds of butter for table use. The butterine I sold came from the Wm. J. Moxley factory.

Q. What class of people did you supply with oleomargarine?

A. Well, the laboring class, the majority of them, you might say all of them, the laboring class. They knew it was oleomargarine and not butter, and they bought it because it was cheaper than butter.

Q. What districts of Chicago did you supply?

A. Well, I go as far as Dakota street, and over to Lake and over to Brighton park, and Dakota street over on the West side, Irving park, and Garfield park, and then to Lake avenue, all around.

29 Mr. BETHEA: I move to strike out the testimony of the witness as incompetent, irrelevant and immaterial.

The COURT: It may go out.

To which ruling of the court the defendant by his counsel then and there duly excepted, which exception was duly allowed.

30 CHARLES F. IZARD, a witness, produced, sworn and examined on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Charles F. Izard. I am in the restaurant business, located at 163 and 165 West Madison street, Chicago, and have been in the restaurant business for two years last April. I have used oleomargarine in my restaurant almost exclusively, except for cooking, up to July 1, 1902. Since that time we cannot use it. The reason is that people object to the color of it. They do not like the looks of it. It don't seem to give them satisfaction because it is white. Since July 1, 1902, we have been using colored butter.

Cross-examination by Mr. BETHEA:

Q. Didn't they object, or didn't they use the butterine where it was colored because they thought it was butter?

A. Why they had no objection to butterine except when it came white, except when it was white. They had no complaint to find with the oleomargarine that had color in it. It was after it came white they were objecting to using it or eating it.

Q. Why didn't you buy the colored oleomargarine when
31 they objected to the white?

A. Well, we had to do that, of course.

Q. That cost ten cents per pound more?

A. Yes, sir.

Q. Is that what you buy now?

A. Well, sometimes we buy that and sometimes we buy this other.

Q. White?

A. No, not the white, colored butter. We cannot use white at all.

Redirect examination by Mr. KEARFUL:

Q. Do you use white oleomargarine for any other purpose than for use on the table?

A. Where we don't use lard we use it for cooking.

Q. What proportion of the colored article that you now buy is oleomargarine and what proportion is butter?

A. We do not use any oleomargarine now excepting we happen to run out of butter or something of that kind. In the case of an emergency we buy it.

Q. What is the reason that you don't buy it now as formerly?
A. Well, it depends upon how much we have, that is how much the man happens to have on hand that comes along that we buy it from; something of that kind. We have objection to this ordinary oleomargarine. We have no objection to the oleomargarine that is colored at all. It gives perfect satisfaction.

Recross-examination by Mr. BETHEA:

32 Q. Can you get good butter cheaper now than you can get this colored oleomargarine?
A. No sir.
Q. Do you know what the difference is in price?
A. Well, it varies considerably. It depends upon the quantities you buy and who you buy it from.
Q. How much, about how much?
A. Oh, it may vary a couple of cents.

Mr. BETHEA: We move to strike out the testimony of this witness on the ground that it is incompetent, irrelevant and immaterial.
The COURT: Let it go out.
To which ruling of the court the defendant, by his counsel, then and there duly excepted; which exception was duly allowed.

JOHN DADIE, called and sworn as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. KEARFUL:

My name is John Dadie. I am secretary of the William J. Moxley corporation. That corporation is engaged in the manufacture of oleomargarine or butterine for sale in various parts of the United States. It manufactured the article involved in this case.
The COURT: Do you use "oleomargarine" and "butterine"
33 interchangeably?
A. We call it oleomargarine legally. In trade it is known as butterine.
Mr. PAGIN: The law defines oleomargarine to be butterine and things called by other names so that the legal term is oleomargarine.
The WITNESS: Oleomargarine or butterine is designed to be used as a substitute for butter, and we color it as butter is colored in order to compete with it. I have been engaged in the business of manufacturing oleomargarine since 1884. The capacity of the Moxley Company factory is in the neighborhood of three to four million pounds per month. It is the largest in the United States. Previous to July 1, 1902, the total output sometimes reached but never exceeded 2,000,000 pounds per month. The output since July 1st, 1902, has varied from 500,000 to 1,000,000 pounds per month. From my knowledge of the manufacture of this article I know that it cannot be produced and sold in competition with butter if the ten-cent tax is paid. This opinion is based largely

upon our experience in manufacturing artificially colored goods upon which we are compelled to pay a tax of ten cents per pound. During the first five months of the present fiscal year, beginning July 1, 1901, we failed to sell any of it at all. During the month of December we did produce and sell 37,594 pounds of artificially colored butterine or oleomargarine upon which the ten-cent tax was paid. The article turned out by our factory previous to July
34 1, 1902, was all of it artificially colored. The uncolored article which we now put out is sold at the present time in its uncolored state largely to the poorer people, and so far as we are able to ascertain, it is displacing lard and is used for cooking purposes rather than for table use.

Q. Will you state if you know why you have been able to produce and sell some colored oleomargarine upon which you have paid the ten-cent tax during the month of December, although, as you say, you cannot manufacture this article and sell it in competition with butter if you pay the ten-cent tax?

A. For the reason that the price of natural butter during the month of December has been extremely high. The market has reached 29 cents a pound, and under these conditions we have been able to produce and sell artificially colored oleomargarine upon which the ten cent-tax was paid, at the price of 24 cents a pound. Now, if the price of butter should drop back to the normal condition of 24 and 25 cents a pound, and I believe that it has within the last few days, we would be practically unable to compete with it in oleomargarine. The average price for butter the year around is approximately in the neighborhood of 25 cents a pound. I am speaking now of the best grades of creamery butter. Dairy butter is considered of a poorer grade, and is sold for considerably less money.

35 Cross-examination by Mr. PAGIN:

Q. How long prior to July 1st, 1902, were you in the business of manufacturing oleomargarine?

A. Since 1884.

Q. You said that the output of your factory never exceeded 2,000,000 pounds per month before that date?

A. Yes, sir, before July 1st, 1902, for 12 months before that time, I think the average output would approximate to one and a half million pounds per month. Since that date, July, August, September, 1902, we sold one million and a half pounds for the whole period; and October, November and December 23, sold two and a half million pounds for that period. Before July 1st, 1902, we used only the Wells-Richardson improved butter color to produce an artificial coloration. Since that date we have been using the same article. We have used some palm oil. We used that for a few days only until the Commissioner of Internal Revenue ruled that its use would subject the product to the ten-cent tax. Prior to July 1, 1902, we had only experimented with it.

Redirect examination by Mr. KEARFUL:

The reason why the uncolored oleomargarine has displaced lard and other substances for cooking purposes is because the price
36 of the two articles is practically the same. At the present time they are selling lard at twen and a quarter cents a pound and butterine at twelve and a half, and the articles being nearly the same price, oleomargarine displace- lard, because it is preferable for cooking purposes. The price of lard at the present time is considered remarkably high. It usually sells from seven to eight cents a pound at this time of the year, and if it should fall to that price the marjet for uncolored oleomargarine would be greatly reduced. As to whether we could manufacture and put on the market oleomargarine at seven or eight cents a pound, that would depend all together on the price of the ingredients that go to make up oleomargarine, but that would be highly improbable. At the present time the price of oleomargarine stock or raw material is, like butter and lard, unusually high.

Thereupon, the Government by its counsel moved to strike out the testimony of the witness; which motion was allowed by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted; which exception was by the court duly allowed.

The defendant then offered in evidence a letter of the acting Commissioner of Internal Revenue, dated November 11th, 1902, to W. D. Guthrie, which reads as follows:

"SIR: The amount of tax collected on oleomargarine at ten cents and one quarter per pound, from July 1st to October 1st 1902, *are* as follows: Oleomargarine at ten cents per pound $9,247.92,
37 oleomargarine at one quarter cent per pound, $33,718.71. The amount collected at two cents per pound during the same period of 1901, was $491,921.82.

Respectfully, ROBERT WILLIAMS, JR.,
Acting Commissioner."

Mr. BETHEA: We do not object to the form of the evidence but we object to the facts stated therein as immaterial and irrelevant.

Which objection was sustained by the court; to which ruling the defendant, by counsel, then and there duly excepted; which exception was duly allowed.

Thereupon, the defendant rested.

Thereupon, the Government in rebuttal, introduced the following evidence:

JOSEPH A. PAINTER, recalled as a witness on behalf of the Government, testified as follows:

Direct examination by Mr. BETHEA:

Q. Mr. Painter, have you made yourself acquainted with the market here in reference to the kind of butter that has been sold the last two years and is being sold now?

28 A. I am very well acquainted with it, yes sir.

Q. What is the fact about there being any butter sold in the natural condition or offered for sale?

A. Natural condition?

Q. Yes, uncolored?

A. Uncolored?

Q. Yes.

A. Well, there is some uncolored butter in the market which is confined I believe, entirely as far as I am aware, to the *Jewish* settlement, sweet butter we call it, unsalted.

Q. You do not know how much the sale of it is limited?

A. I never found it in any other locality except in the Jewish settlement. I never found it anywhere else in the city.

Q. You do not know but they may sell that at the good hotels and restaurants and cafés here to people that want it?

A. Why, they may.

Q. Have you independently any knowledge as to what kind of butter is used part of the time at the best hotels?

A. I do not know.

Thereupon, the Government rested in rebuttal.

The above and foregoing transcript contains all the evidence introduced or offered to be introduced on the trial of said cause.

39 Thereupon the defendant moved the court to find in favor of the defendant and to render a verdict and judgment of not guilty and to discharge the defendant, which motion is in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division. }

In the District Court, December Term, A. D. 1903.

UNITED STATES OF AMERICA }
vs. } Information.
FREDERICK J. SCHICK. }

Motion to Find the Defendant Not Guilty.

Comes now the defendant by his counsel and, upon the evidence before the court, moves the court to find in favor of the defendant and render a verdict and judgment of not guilty, and discharge the defendant, because the act of Congress of May 9th, 1902, which is an amendment to the act of Congress of August 2nd, 1886, relating to butter and oleomargarine, in so far as it imposes a tax of eight cents per pound in addition to the tax imposed by the said act of August 2, 1886, upon oleomargarine containing "artificial coloration that causes it to look like butter of any shade of yellow," is in

40 contravention of the Constitution of the United States and of the amendments thereto and is illegal and void for the following reasons, to wit:

First. The act deprives the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law;

Second. The act is an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States;

Third. The act so arbitrarily discriminates against oleomargarine in favor of butter as to be repugnant to those fundamental principles of equality and justice which are inherent in the Constitution of the United States.

Dated January 22, 1903.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Mr. KEARFUL: Upon this motion we should like to be heard.

The COURT: I do not think I want to hear you. I think it is a matter so peculiarly for the Supreme Court that it should go there. I might say that it seems to me to call for the decision of that court upon the constitutionality of the act. I think the matter is well worthy of consideration. I do not think that this court,
41 however, should go back of the statute.

Mr. KEARFUL: I will concede, your honor, if you will permit me, that it would be entirely proper in a case of doubtful constitutionality for the lower court to hold a statute constitutional and let the Supreme Court pass upon it, but I believe that it is the established rule that if the statute is so clearly unconstitutional that this can be demonstrated to the court, it should be held so by that court. And while the rule is different in the case of a doubtful statute, to my mind there is no doubt here and I believe I can show the court the reasons which may induce it to believe as I do, that there is no doubt of the unconstitutionality of the statute.

The COURT: No sir, I think this matter should go to the Supreme Court and be there decided. The statute is not so doubtful in my mind as to warrant me in holding that it is unconstitutional. I therefore overrule the motion and find the defendant guilty.

To which ruling and finding of the court the defendant, by his counsel, then and there duly excepted; which exception was duly allowed.

Thereupon, the defendant presented and filed the following motion for a new trial:

42 UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } *ss:*

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
FREDERICK J. SCHICK. } Information.

Motion for New Trial.

Now comes the defendant and moves the court to set aside the finding of guilty herein and to grant a new trial of said cause for the following reasons, to wit:

(1.) The finding is contrary to the evidence.

(2.) The finding is contrary to the law.

(3.) The court struck out and refused to consider proper evidence offered and received on behalf of the defendant.

Dated January 23rd, 1903.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Which motion was by the court overruled; to which ruling the defendant by counsel then and there duly excepted; which exception was by the court duly allowed.

43 Thereupon, the defendant, by his counsel, presented and filed a motion in arrest of judgment upon the same grounds as those specified in his foregoing motion to find the defendant not guilty; which grounds the counsel for the respective parties agree may be here considered as inserted herein; which motion in arrest of judgment was by the court overruled; to which ruling, the defendant, by his counsel, then and there duly excepted; which exception was by the court duly allowed.

Thereupon, the defendant, being present in open court, the court pronounced its judgment upon the aforesaid finding of guilty and adjudged that the defendant pay a fine of fifty dollars ($50.00) and costs, and that execution issue therefor.

Thereupon, the defendant, by his counsel, gave oral notice in open court of his intention to apply for a writ of error to review said judgment and proceedings in the Supreme Court of the United States, and prayed for a stay of execution to enable him to prepare and file a bill of exceptions.

Thereupon, the court ordered execution of said judgment to be stayed for a period of twenty days and allowed the defendant twenty days within which to prepare and file a bill of exceptions.

44 And now in furtherance of justice and that right may be done, the defendant presents the foregoing as his bill of ex-

ceptions in this case, and prays that the same may be settled and allowed and signed and certified by the judge as provided by law.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

The foregoing bill of exceptions is true in all respects and is hereby approved, allowed and settled and made a part of the record herein.

Done in open court at the December term, 1902, and dated this 27 day of January, 1903.

KOHLSAAT, *Judge.*

Endorsed: 3417. U. S. dist. court, nor. dist. of Ill. The United States *vs.* Frederick J. Schick. Bill of exceptions. Filed Jan. 27, 1903 at 10 o'clock a. m. T. C. MacMillan, clerk.

45 And afterwards, to wit, on the 27th day of January, A. D. 1903, there were filed in the clerk's office of said court in the above-entitled cause, a petition for writ of error and assignment of errors; the same being in the words and figures following to wit:

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } *ss:*

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA }
vs. } 3417. Information.
FREDERICK J. SCHICK. }

Petition for Writ of Error.

And now comes Federick J. Schick, defendant herein, and says that on the 22nd day of January, 1902, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, the defendant prays that a writ of error may issue in this behalf returnable in the Supreme Court of the United States, for the correction of the errors so complained of, that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and that an order may be made fixing the amount of security
46 which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the deter-

mination of said writ of error by the Supreme Court of the United States.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

47 UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division. }

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA }
vs. } Information.
FREDERICK J. SCHICK. }

Assignment of Errors.

The defendant in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of the cause, to wit:

I.

Error in refusing to hold that the provisions of the act of Congress of May 9, 1902, amending the act of Congress of August 2, 1886, relating to oleomargarine and butter, under which the defendant was prosecuted, is in contravention of the Constitution of the United States and the amendments thereto, because:

48 (1.) The said provision deprives the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law.

(2.) The said provision constitutes an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States.

(3.) The said provision so arbitrarily discriminates against the oleomargarine industry in favor of the butter industry in the United States as to be repugnant to the fundamental principles of equality and justice inherent in the Constitution of the United States.

II.

Error in striking out and refusing to consider proper evidence offered and received on behalf of the defendant, showing:

(1.) That the natural color of butter varies at different seasons of the year from almost pure white in the winter season to a high shade of yellow in the spring of the year, if made from the milk of grass or clover fed cows; and that all butter during all seasons of the year, including that made from the milk of grass or clover fed cows, is uniformly colored a shade of yellow somewhat deeper than the natural color of June butter, before it is put on the market;

49 (2.) That there is no demand in the market for butter having only its natural color, except June butter, and that there is no demand in the market for oleomargarine for table use unless the same is colored a shade of yellow which causes it to look like yellow butter.

(3.) That oleomargarine is a substitute for and competes with butter, and that the market demand for both butter and oleomargarine requires that they shall have a uniform color of a shade of yellow during all seasons of the year.

(4.) That the cost of production of oleomargarine is such that, after payment of a tax of ten cents per pound thereon, as required by the said act of Congress of May 9, 1902, amending the act of August 2, 1886, relating to oleomargarine and butter, the same cannot be sold in competition with butter.

(5.) That the operation and effect of the act of Congress relating to butter and oleomargarine, of August 2, 1886, as amended by the act of Congress of May 9, 1902, are to prevent the people of the United States from obtaining oleomargarine in the condition in which
50 they want it and to destroy the oleomargarine industry in this country and unjustly to discriminate against the same in favor of the butter industry.

WILLIAM D. GUTHRIE.
FRANCIS J. KEARFUL.
CHARLES C. CARNAHAN.
DELAVAN B. COLE.

Endorsed: District court of Ill. Northern district of Ill. Northern division. Petition for writ of error and assignment of errors. No. 3417. United States of America *vs.* Frederick J. Schick. Filed Jan. 27, 1903, at 10 o'clock a. m. T. C. MacMillan, clerk.

51 And afterwards, to wit, on the 27th day of January A. D. 1903, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, judge, to wit:

UNITED STATES OF AMERICA
vs.
FREDERICK J. SCHICK. } 3417.

This 27th day of January, A. D. 1903, came the defendant by his attorney, and filed herein his petition for a writ of error and an assignment of errors, to have reversed in the Supreme Court of the United States the judgment heretofore entered herein, and thereupon the court does allow the *the* said writ of error upon the defendant giving bond according to law in the sum of five hundred dollars, which bond shall operate as a supersedeas and stay of execution upon said judgment.

52 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court, in the above-entitled cause a bond on writ of error, the same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division.

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
FREDERICK J. SCHICK. } 3417. Information.

Bond on Writ of Error.

Know all men by these presents, that we, Frederick J. Schick as principal, and William J. Moxley as surety, are held and firmly bound unto the defendant in error, The United States of America, in the full and just sum of five hundred dollars ($500) to be paid to said defendant in error, The United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seal and dated this 26th day of January in the year of our Lord one thousand nine hundred and three.

53 Whereas, lately at a district court of the United States of America, for the northern district of Illinois, northern division, in a suit pending in said court, between The United States of America, plaintiff, and Frederick J. Schick, defendant, a judgment was rendered against the said Frederick J. Schick, and the said Frederick J. Schick having obtained a writ of error and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, defendant in error, citing and admonishing it to appear at a session of the Supreme Court of the United States to be holden at the city of Washington in the District of Columbia, on or before the 26th day of February next:

Now the condition of the above obligation is such that if the said Frederick J. Schick shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

FREDERICK J. SCHICK. [SEAL.]
WILLIAM J. MOXLEY. [SEAL.]

Sealed and delivered in the presence of:
FRANCIS J. KEARFUL.
JOHN DADIE.

Approved this 27 day of January, A. D. 1903.
KOHLSAAT,
United States District Judge.

Endorsed: No. 3417. United States *vs.* Frederick J. Schick. Bond on writ of error. Filed Jan. 27, 1903 at 10 o'clock a. m. T. C. MacMillan, clerk.

54 And afterwards, to wit, on the 28th day of January, A. D. 1903, there was filed in the clerk's office of said court, in the above-entitled cause, a præcipe for record, the same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the District Court of the United States, December Term, A. D. 1903.

UNITED STATES OF AMERICA
vs.
FREDERICK J. SCHICK. } Information. 3417.

Præcipe for Record.

The clerk of said court will make up an authenticated and complete transcript of the record in the above-entitled cause.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Endorsed: No. 3417. District court of the United States. Northern district of Illinois. Northern division. United States of America *vs.* Frederick J. Schick. Præcipe for record. Filed Jan. 28, 1903. T. C. MacMillan, clerk.

55 NORTHERN DISTRICT OF ILLINOIS,
Northern Division, } ss:

I, T. C. MacMillan, clerk of the district court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said court and made in accordance with præcipe filed in the cause entitled The United States *vs.* Frederick J. Schick as the same appear from the original records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago in said district and division, this second day of February A. D. 1903.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN, *Clerk.*

56 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court a writ of error, in the above-entitled cause, the same being in the words and figures following, to wit:

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Christian C. Kohlsaat, judge of the district court of the United States for the northern district of Illinois, northern division, Greeting:

Because, in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said district court, before you, between The United States of America, plaintiff, and Frederick J. Schick, defendant, wherein was involved the construction and application of the Constitution of the United States, and wherein the constitutionality of a law of the United States was drawn in question, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at the city of Washington, on the 26th day of
57 February next, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of January in the year of our Lord, one thousand nine hundred and three.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois, Northern Division.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a true and complete copy of the record and all proceedings in the foregoing-entitled cause as witness my hand and official seal this 2nd day of February A. D. 1903.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois.

Copy deposited for the defendant in error in the office of the clerk of the district court of the United States for the northern district of Illinois.

[Endorsed:] Writ of error. Filed Jan. 27, 1903 T. C. MacMillan clerk.

58 *Citation.*

Supreme Court of the United States.

UNITED STATES OF AMERICA,
District Court of the Northern District of Illinois, Northern Division, } *ss:*

To the United States of America and Solomon H. Bethea and Oliver E. Pagin, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, on the 26th day of February next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the northern district of Illinois, northern division, wherein Frederick J. Schick is plaintiff in error and The United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 27th
59 day of January, A. D. 1903, and of the Independence of the United States the one hundred and twenty-seventh.

KOHLSAAT,
Judge of the District Court of the United States for the Northern District of Illinois, Northern Division.

Attest: T. C. MACMILLAN, *Clerk.*

Service of the within citation and receipt of a copy thereof admitted this 27th day of January, 1903.

S. H. BETHEA,
United States Att'y, Attorney for Defendant in Error.

Filed January 27, A. D. 1903.

T. C. MACMILLAN, *Clerk.*

Endorsed on cover: File No. 18,843. N. Illinois D. C. U. S. Term No. 615. Frederick J. Schick, plaintiff in error, *vs.* The United States. Filed February 24, 1903.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. 224.

WILLIAM BROADWELL, PLAINTIFF IN ERROR,

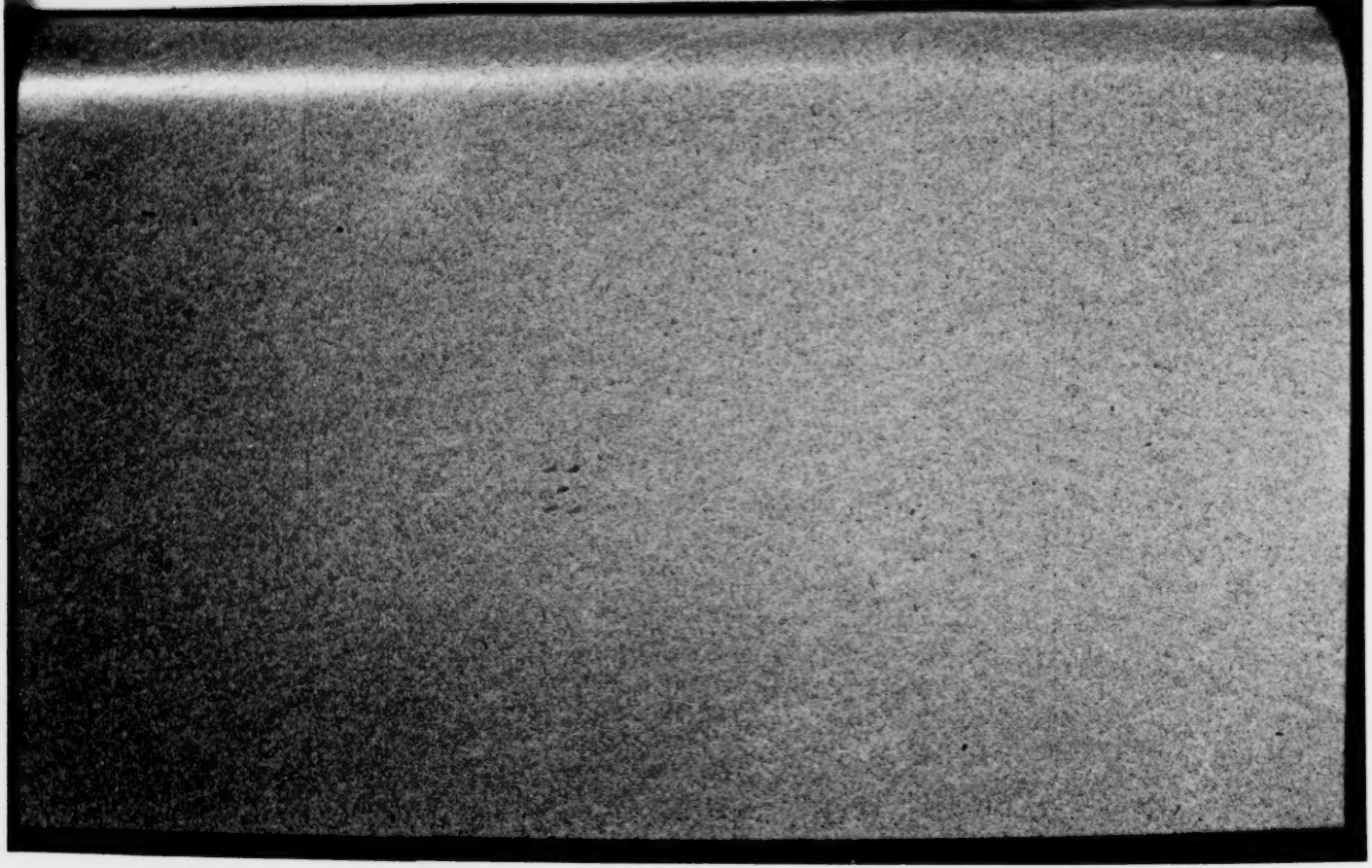
vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED FEBRUARY 24, 1902.

(18,844.)



(18,844.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 616.

WILLIAM BROADWELL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas had at a regular term of the district court of the United States for the northern division of the northern district of Illinois, begun and held at the United States court-rooms, in the city of Chicago, in said division of said district, on the third Monday of December (it being the fifteenth day thereof), in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred — twenty-seventh year.

Present: The Honorable Christian C. Kohlsaat, judge of said court and the Honorable J. Otis Humphrey, judge of the district court of the United States for the southern district of Illinois, sitting in this court by designation, presiding, John C. Ames, marshal for the northern district of Illinois, and T. C. MacMillan clerk of the district court of the United States for the northern district of Illinois.

2 THE UNITED STATES
vs. } 3416.
WILLIAM BROADWELL.

Be it remembered that heretofore to wit on the 22nd day of January, A. D. 1903, it being one of the days of the December 1902 term of the district court of the United States for the northern division of the northern district of Illinois, begun and held in the United States court-rooms in the city of Chicago, in said division of said district on the third Monday of December, it being the fifteenth day thereof in the year of our Lord one thousand nine hundred and two and of the Independence of the United States of America the one hundred and twenty-seventh year, before the Honorable Christian C. Kohlsaat, judge of said court, presiding, the following order was had and entered of record in said cause to wit:

3 THE UNITED STATES
vs. } 3416.
WILLIAM BROADWELL.

Comes S. H. Bethea, Esq., district attorney and presents the affidavit of Joseph A. Painter and a criminal information against William Broadwell based thereon and asks leave of the court to file the same; whereupon it is ordered by the court that said affidavit and information be filed and the cause placed upon the dockets of this court.

And afterwards to wit on the 22nd day of January, A. D. 1903, said affidavit was filed, the same being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

NORTHERN DISTRICT OF ILLINOIS, *Northern Division,* } *ss.:*

Joseph A. Painter being first duly sworn, on oath, deposes and says that he resides in the city of Chicago, Illinois; that he is a deputy internal-revenue collector in and for the first internal-revenue collection district of Illinois; that on, to wit, the 22nd day of December, A. D. 1902, William Broadwell in the city of Chicago, in the division and district aforesaid, and in the first internal-revenue collection district of Illinois, was a retail dealer in oleomargarine; that the said William Broadwell at the time and place aforesaid, so being such retail dealer in oleomargarine, unlawfully did knowingly purchase and receive for sale certain oleomargarine which had not been stamped according to law,
4 that is to say, ten pounds of a mixture and compound composed, as the said William Broadwell, then and there well knew, of oleo oil, neutral lard, cream, common salt, and Wells-Richardson's improved butter color; that said last-named ingredient, to wit, Wells-Richardson's improved butter color, produced an artificial coloration in the said oleomargarine that caused it to look like butter of a shade of yellow; that said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid, by Wm. J. Moxley, a corporation organized and existing under and by virtue of the laws of the State of Illinois; that said oleomargarine was then and there purchased and received for sale by said William Broadwell as aforesaid from the said Wm. J. Moxley, a corporation as aforesaid; and that when said oleomargarine was purchased and received for sale as aforesaid, it was contained in a new wooden original manufacturer's package to which, as the said William Broadwell then and there well knew, no coupon, stamp or stamps in the sum of ten cents for each pound of oleomargarine so contained therein had then and there been or was affixed by the said manufacturer, or by any other person, for denoting the payment of the internal-revenue tax on the oleomargarine so contained therein.

And the said Joseph A. Painter therefore prays that the said William Broadwell may be apprehended and held to answer said charge and to be further dealt with according to law.

Dated this 23rd day of December, A. D. 1902.

JOSEPH A. PAINTER.

Subscribed and sworn to before me this 23rd day of December, A. D. 1902.

CHAS. A. BUELL,
Deputy Clerk U. S. Dist. Court, Northern Dist. of Illinois.

Endorsed: U. S. district court for the N. dist. of Ills., N. div. No. 3416. The United States *vs.* William Broadwell. Affidavit. Filed Jan. 22, 1903, at 2 o'clock p. m. T. C. MacMillan, clerk. (B.)

5 And afterwards, to wit, on the 22d day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a criminal information, the same being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the December Term, in the Year of Our Lord Nineteen Hundred and Two.

NORTHERN DISTRICT OF ILLINOIS, *Northern Division,* } *sct:*

Be it remembered, that S. H. Bethea, attorney of the United States of America for the northern district of Illinois, who for the said United States in this behalf prosecutes, in his own person comes here into the district court of the said United States for the division and district aforesaid, on this twenty-second day of January, in this same term, and for the said United States gives the court here to understand and be informed, that William Broadwell, late of the city of Chicago, in the said division and district, on the twenty-second day of December, in the year of our Lord nineteen hundred and two, at Chicago aforesaid, in the division and district aforesaid and in the first internal-revenue collection district of Illinois, was a retail dealer in oleomargarine; and that the said William Broadwell then and there, so being such retail dealer in oleomargarine, unlawfully did knowingly purchase and receive for sale certain oleomargarine which had not been stamped according to law,—that is to say, ten pounds of a mixture and compound composed, as he the said William Broadwell then and there well knew, of oleo oil, neutral lard, cream, common salt, and Wells-Richardson's improved butter color, (which said last-named ingredient, to wit, Wells-Richardson's improved butter color, produced an artificial coloration in the said oleomargarine that caused it to look
6 like butter of a shade of yellow) which said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid by William J. Moxley, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and then and there was purchased and received for sale by the said William Broadwell as aforesaid, and, when so as aforesaid purchased and received for sale, was contained in a new wooden original manufacturer's package to which, as he, the said William Broadwell then and there well knew, no coupon stamp or stamps, in the sum of ten cents for each pound of oleomargarine so contained therein, then and there had been or was affixed by the said manufacturer, or by any other person, for denoting the payment of the internal-revenue tax on the oleomargarine so contained therein; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Whereupon the said attorney of the said United States, who prosecutes as aforesaid, for the said United States prays the consideration

of the court here in the premises, and that due process of law may be awarded against him, the said William Broadwell, in this behalf, to make him, answer to the said United States concerning the premises aforesaid.

S. H. BETHEA,
United States Attorney.

Endorsed: No. 3416. U. S. district court for the N. dist. of Ills., N. div. The United States *vs.* William Broadwell. Information on sec. 11, act of Aug. 2, 1886, as amended by sec. 3, act of May 9, 1902 internal-revenue laws. Filed in open court Jan. 22, 1903 at 2 o'clock p. m. T. C. MacMillan, clerk. S. H. Bethea, U. S. att'y N. dist. Ill.

7 And afterwards, to wit, on the 22nd day of January, A. D. 1903, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, judge, to wit:

THE UNITED STATES
vs. } 3416.
WILLIAM BROADWELL.

Comes the United States by S. H. Bethea, Esq., district attorney, comes also the defendant William Broadwell, in his own proper person as well as by counsel and said defendant being arraigned upon the information filed herein against him pleads not guilty thereto and the parties having waived the intervention of a jury, the cause is submitted to the court for trial, whereupon, after the hearing by the court of the evidence by the parties adduced and arguments of counsel, the said defendant by his attorney moves the court to find the defendant not guilty, which said motion is by the court overruled and denied, to which ruling of the court said defendant by his attorney duly excepts. Thereupon the court being fully advised in the premises finds the defendant William Broadwell guilty as charged in the information. Thereupon the defendant by his attorney enters his motion for a new trial herein which said motion after hearing of arguments and due consideration by the court is overruled and denied, and thereupon said defendant by his attorney enters his motion in arrest of judgment which motion in arrest after hearing of arguments and due consideration by the court is overruled and denied, and said defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered by the court and as the sentence and judgment of the court upon the finding of guilty herein as aforesaid that the defendant William Broadwell forfeit and pay to the United States a fine in the sum of fifty dollars besides the costs in this behalf expended, and that execution shall issue therefor.

8 And afterwards, to wit, on the 27th of January, A. D. 1903, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, judge, to wit:

THE UNITED STATES
vs.
WILLIAM BROADWELL. } 3416.

Come the parties by their attorneys and on motion it is ordered by the court that leave be and it hereby is given said defendant to file his waiver of jury, motion to find defendant not guilty, and motion for a new trial herein, *nunc pro tunc* as of January 22, 1903.

And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court, in the above-entitled cause, a waiver of jury trial, the same being in the words and figures following, to wit:

9 UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } *ss:*

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
WILLIAM BROADWELL. } Information.

Waiver of Jury Trial.

Now, come the respective parties and, by their counsel, waive a trial by jury herein and agree to submit the issues herein to the court.

Dated January 22, 1903.

S. H. BETHEA,
U. S. Att'y, for the Government.
WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
For the Defendant.

Endorsed: United States district court. Northern district of Ill. northern division. Waiver of jury trial. United States of America *vs.* William Broadwell. Gen. No. 3416. Filed by leave of court Jan. 27, 1903, at 10 o'clock a. m. T. C. MacMillan, clerk. *Nunc pro tunc* Jan. 22, 1903.

10 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a motion to find the defendant not guilty, the same being in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } ss:

In the District Court, December Term, A. D. 1892.

UNITED STATES OF AMERICA }
vs. } Information.
WILLIAM BROADWELL. }

Motion to Find Defendant Not Guilty.

Comes now the defendant, by his counsel, and, upon the evidence before the court, moves the court to find in favor of the defendant and to render a verdict and judgment of not guilty and that he be discharged, because the act of Congress relating to butter and oleomargarine of August 2, 1886, as amended by the act of Congress of May 9, 1902, is in contravention of the Constitution of the United States and of the amendments thereto and is illegal and void, for the following reasons, to wit:

First. The act deprives the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law.

Second. The act is an unlawful encroachment upon and interference with the police powers reserved to the several States and to the people of the United States;

Third. The act invests inferior executive officers with the power finally and arbitra-ily to determine essentially judicial questions concerning vast property rights;

11 Fourth. The act so arbitra-ily discriminates against the oleomargarine industry in favor of the butter industry in the United States as to be repugnant to the fundamental principles of equality and justice which are inherent in the Constitution of the United States.

Dated January 22, 1903.

WILLIAM D. GUTHRIE.
FRANCIS J. KEARFUL.
CHARLES C. CARNAHAN.
DELAVAN B. COLE.

Endorsed: District court of U. S. northern district of Ill. northern division. Motion to find the defendant not guilty. United States of America *vs.* William Broadwell. Gen. No. 3416. Filed by leave of court Jan. 27, 1903, at 10 o'clock a. m. T. C. MacMillan, clerk. *Nunc pro tunc* Jan. 22, 1903.

12 And afterwards, to wit, on the 22nd day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a motion for a new trial, same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
WILLIAM BROADWELL. } 3416. Information.

Motion for New Trial.

Now comes the defendant and moves the court to set aside the finding of guilty herein and to grant a new trial of said cause for the following reasons, to wit:

(1.) The finding is contrary to the evidence.

(2.) The finding is contrary to the law.

(3.) The court struck out and refused to consider proper evidence offered and received on behalf of the defendant.

Dated January 22, 1903.

WILLIAM D. GUTHYE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Endorsed: District court of U. S., northern district of Ill., northern division. Motion for new trial. United States of America vs. William Broadwell. Gen. No. 3416. Filed by leave of court Jan. 27, 1903 at 10 o'clock a. m. T. C. MacMillan, clerk. *Nunc pro tunc*, Jan. 22, 1903.

13 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court in the above-entitled cause, a bill of exceptions, the same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division. }

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
WILLIAM BROADWELL. } 3416. Information.

Bill of Exceptions.

Be it remembered that the above-entitled cause, coming on for trial on January 22nd, A. D. 1903, the same being one of the days of the regular December 1902 term of said court, before the Honorable Christian C. Kohlsaat, judge of said court, the Govern-

ment appearing by its counsel, Solomon H. Bethea and Oliver E. Pagin, and the defendant appearing in person and by his counsel, William D. Guthrie, Francis J. Kearful, Charles C. Carnahan and Delavan B. Cole, the following proceedings were had:

Trial by jury was waived by a stipulation in writing duly signed and filed and the cause was submitted to the court.

14 Thereupon the Government to maintain the issues on its part, introduced the following evidence:

JOSEPH A. PAINTER, called and sworn as a witness on behalf of the Government, testified as follows:

Direct examination by Mr. PAGIN:

My name is Joseph A. Painter. I am a deputy collector of internal revenue for the first collection district of Illinois, which embraces the city of Chicago.

I know the defendant, William Broadwell. He is a dealer in meats and butter, cheese, eggs and so on, at the corner of Fifth avenue and Madison street, Chicago, and a retail dealer in oleomargarine. I visited his place on the 22nd day of December, A. D. 1902 and I found this ten-pound package of oleomargarine, which has no stamp whatever. He said he bought it for sale. He got it from the William J. Moxley Company, corner Randolph and Clinton streets, Chicago. The defendant admitted at the time that he knew its character and ingredients and that no tax had been paid on it. The ingredients of the oleomargarine in that package were oleo oil, neutral oil, cream, common salt, Wells-Richardson improved butter color; no cotton-seed oil or palm oil in that product.

15 It was yellow, the natural color of yellow June butter. It was manufactured by William J. Moxley, incorporated in December 1902. There were no internal-revenue stamps on the package. There should have been a tax at the rate of ten cents per pound.

Thereupon, the Government rested.

16 Thereupon, the defendant to maintain the issues on his part, offered and introduced the following evidence:

ANDREW E. BERGLAND, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Andrew E. Bergland. I am employed by the Moxley Company as foreman and have been so employed for 18 years, about. I superintended the manufacture of the article just testified to by the internal-revenue inspector and can state the proportions of the ingredients contained in the article. There was 2 lbs. and 8 oz. of oleo oil; 4 lbs. and 7½ oz. of neutral lard; 1 lb. and 12 oz. of cream 1 lb. and 4 oz. of salt; and a quarter of an ounce of color,

Wells-Richardson's improved butter color. That was according to a formula which is used in the course of business at the factory. We call it special grade. It is one of the high grades. It is designed to be used as a substitute for butter.

MARK DE LA FONTAINE, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

17 My name is Mark de la Fontaine. I am a chemist and have been a chemist nearly 50 years. I am familiar with the chemical properties of oleomargarine or butterine, and butter.

(The ingredients of the article in question and their proportions as testified to by the previous witness were read to this witness as follows: "2 lbs. and 8 oz. of oleo oil; 4 lbs. and 7½ oz. of neutral lard; 1 lb. and 12 oz. of cream; 1 lb. and 4 oz. of salt, and a quarter of an ounce of color, Wells Richardson's improved butter color.")

I can state the difference between the chemical properties of the article manufactured according to the formula just read and pure creamery or dairy butter. Considering only the fat part alone the difference lies in this, that the creamery butter contains on an average about 8 or 9 % of a mixture of butyrin, one or two others, caproin and caprin, in very small quantities, but essentially butyrin which is about 7 %, whilst in oleomargarine or butterine made according to the process or formula given here, the proportion of butyrin is less, how much less depends upon the quantity of cream used. The cream is not a uniform article. Sometimes it contains more fat, sometimes less; consequently sometimes more butyrin, sometimes less. There is nothing at all in this difference which affects the wholesomeness of the article. These elements, which are absent to some extent in oleomargarine, in the process of nu-

18 trition play the same part as the remainder of the fat, that is, they are used mostly as fuels; they are burned out in the system and generate heat and in that respect the properties or components that we are speaking of, butyrin and its first cousins, caproin and caprin, produce less heat than the palmitin of lard and the oleo oil.

There is a difference in the flavor on account of difference in the proportion of these components, because the flavor is largely due to butyrin and at the same time it is the butyrin which becomes rancid first, an action which has a tendency to make butter strong in flavor. To some extent the smaller the quantity of butyrin in oleomargarine is an advantage because it would keep fresh longer than butter.

There are other things to consider with regard to butterine turning rancid. There is not so much curd of the cream or the milk and some ferments to be worked out. With the exceptions named the substances, oleomargarine and butter are substantially similar.

I don't know any difference between the palmitin, olein and stearin of butter and those of butterine or oleomargarine. I am familiar with at least one butter color used for coloring butter and oleomargarine. It is extensively sold under the name of the Wells-

Richardson butter color. It is a solution of a yellow coal-tar coloring matter in oil, generally cotton seed oil. I have never found any statement that it was injurious. It is not on the list of the
19 injurious colors. It is on the list of colors that are permitted—that is, the use of which is allowed to confectioners as well as butter-makers. It is the same coloring matter that is universally used to color butter as well as oleomargarine. It has taken the place of annatto because it is cheaper and more desirable. It requires less of it to produce the same effect. There is nothing unwholesome about it. As I say it is on the list of colors, the use of which is allowed to confectioners and butter-makers.

Cross-examination by Mr. PAGIN:

There is no palm oil in the butter color. According to the amount used it will give to oleomargarine or butter a dark-yellow or orange or very pale-yellow color. It is simply a question of proportion or quantity.

Q. You speak of a list of permitted and prohibited colors; what do you mean by that list?

A. Well, some of the European governments have had the question of coal-tar colors and other colors investigated in regard to their being poisonous or not poisonous and therefore as to their being available or not for coloring articles of food. There was issued a list of the colors which are poisonous and therefore should not be used and another list of colors which are permitted.
20 The list is recognized in this country.

Q. In the State of Illinois under the pure-food law is there any such list?

A. I don't know whether the pure-food law mentions any of the colors; but for instance you will find that list in Leffman & Beam on the Analysis of Food. Then a similar list is in all the circulars published by the committee of the National Association of Confectioners, or a name like that, which has branches all over the United States.

Mr. KEARFUL: We have other witnesses to the same facts.
Mr. BETHEA: Well, that is enough.
The COURT: You may consider them in to corroborate it.
Mr. BETHEA: Yes.

HENRY BOEHMER, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Henry Boehmer. I live at Barrington, Illinois. I am a manufacturer of creamery butter at that place, or other places, about 25 or 26 years as near as I can recollect.

Q. Look at the article involved in this case and state whether or not it corresponds in color to the ordinary color of creamery butter which is put on the market in Chicago?

A. Why, I think it is as near as we could have it as creamery butter.

21 I am familiar with the business of manufacturing creamery butter generally throughout the western portion of the United States.

Q. Are you able to state the custom of butter manufacturers as regard to coloring butter throughout the year?

Mr. [illegible] immaterial and irrelevant and incompetent.

The COURT: Yes, I do not think that is proper.

Mr. KEARFUL: It seems to me, your honor, that it is necessarily a part of our case; and, while your honor may differ with me, I would like to have this evidence in.

Mr. BETHEA: Make your offer.

The COURT: The object is to show that there is artificial coloring matter used in the manufacture of butter, is that it?

Mr. KEARFUL: Well, it goes a little further than that. I want to state the proposition to the court. This case will have to turn upon the effect of this statute as it may be observed by the court in its operation; and if it is observed to operate so as to prevent the people of the country from obtaining oleomargarine in the way in which they want it and to destroy the business of oleomargarine because the manufacturer cannot sell it to the people in the way in which

22 they want it, that will be one branch of our contention that it is a discrimination which deprives these parties of their liberty and property without due process of law. Now, the fact being that whether it is butter or whether it is oleomargarine the people want it a uniform shade of color throughout the year, and they want buy white butter or they want buy white oleomargarine, and in the presence of that fact, Congress places such a tax upon one of these articles as to prevent its being used and sold. It is therefore necessary to show as an essential fact that oleomargarine and butter, one used as a substitute for the other, are commonly colored a uniform color throughout the year, because that is the demand of the consumers; and I want to say this, that if it should turn out that our contention is correct—if your honor should take the wrong view of this matter, as courts may do sometimes,—it would only result in this case being sent back for further hearing in order to determine the facts upon that point.

The COURT: I think you may make what showing you please, and then they may move to strike it out.

Mr. BETHEA: We do not care to have it go in, but we want our objection in where we think the evidence is improper.

It was then agreed that it should be understood that the Government's counsel objected to this line of testimony from any witness, and objected to any incompetent testimony, but that the evidence should be received and the right of the Government reserved to move to strike it out.

The WITNESS: I am familiar with the custom among butter manufacturers in regard to using coloring matter. It is used by man-

ufacturers the year around. We call it a June color when we
23 speak of it for butter, what is sold in Chicago and, for instance, at Washington, Philadelphia, and so forth, it is what we call a June color. The sample involved in this case is just about as near to perfect June color as we can get. We buy the prepared color. We used to make our own color but now we buy it, what we call a butter color. It is a commercial article and there are different kinds. I am acquainted with the Wells-Richardson butter color. I should think the percentage of the amount used would be in favor of the Wells-Richardson. There are other colors used a great deal like Hanson's, and so forth.

Q. To what extent throughout the year is it colored?

A. Well, there is a difference. Different places require different colors, but as a general rule, what we call a June color. It is the color what we should give it. Grass should give that color to butter. That is why we call it June color.

Q. Do you try to obtain the color of June butter?

A. Yes, that is what we call the June color.

The COURT: Don't you color June butter also?

A. Yes sir, but not as much as perhaps butter made in December. That is the only difference.

Mr. KEARFUL: What is the natural color of butter in December and other months of the year when cattle do not get clover
24 and grass?

A. At this time of the year and the time of the year when there is no grass, it is, you might say, white, or pretty near a perfect white.

Q. In the creamery business is there any demand for butter in its natural condition and with its natural color?

A. No sir.

Q. Do you know whether there is any demand amongst butter manufacturers for uncolored butter?

A. Not that I know of, I don't think there is, because what I have seen is all colored.

Q. Have you any knowledge of the character of the butter to be found upon the tables throughout the United States or any part of it?

A. Why, all the butter I have seen is colored, more or less. Different places has different colors sometimes; different sections of the country each has a uniform color that it demands.

Cross-examination by Mr. BETHEA:

Q. They do not color butter in the summer time when the cows are eating clover, do they?

A. Yes sir.

Q. Why do they do that?

A. Why—I never made butter, or *or* saw butter made at any time of the year but that comes to what we call the June color, they all color it some. But that time of the year, perhaps they only

use—oh, about a quarter, that is when there is clover or
25 grass, of the amount that they use at this time of year.

Q. Doesn't clover make the butter naturally a butter color, a butter yellow?

A. It don't make it as high color as the people wants it.

Q. Well, you do not mean to say they do not use any butter in the natural condition at any time of the year, that nobody uses it?

The COURT: In the market, he says.

Mr. BETHEA:

Q. In the market. What do you say about that?

A. Why, I do not think that there is one farmer out of a thousand that puts on the market the kind of butter we make but that is colored the year around.

Q. You do not mean to say that in the market there is no natural butter at any time of the year?

A. Why, there is natural butter, but it is colored.

Q. I mean with the natural butter color. Suppose it is June or July?

A. I do not think there is.

Q. Isn't there some butter sold anywhere in June or July that is not colored?

A. Not what we call the regular butter put on the market.

Q. Don't the farmers bring in butter and sell it?

A. I do not think they do very much. I think most of the farmers' butter is colored.

Q. What is the use of coloring it in the summer time when
26 it is naturally the color that gives the reputation to butterine?

A. Because people want the color, so we color it.

The COURT: So as to make a uniform color?

A. Yes sir, that is the aim of the coloring June butter.

Mr. BETHEA:

Q. You can remember, can't you, when butter was sold its natural way?

A. Why, I do in the old country, but I do not remember in this country. I have lived in this country about thirty years.

Q. Now, aren't you mistaken about that?

A. No, I am not, because I have been in business twenty-six years, I think, twenty-five or twenty-six.

Q. Do you mean to say that thirty years ago that the people of this country, the farmers, people who produced butter, colored it in the summer time?

A. I do not say thirty years but I say twenty-six, because I have been in the business twenty-five or twenty-six years.

Q. Well, this butter was a pretty good article that was not colored, wasn't it, the natural condition?

A. Why, as far as taste the article is all right.

Q. Yes, and looks? Take the summer butter, how would you

improve on that, natural butter, where the cows have been eating grass and clover?

A. Why, it might be all right, it would be all right for me, because I would know what it was. But for the people that we sell it to, they would rather have the color.

Q. Why? Are they afraid it is oleomargarine if it is not
27 colored?

A. Well, that I do not know.

Mr. KEARFUL: Does the idea of the uniformity of the butter which comes into the market have anything to do with coloring butter which is already naturally a butter color?

The COURT: He has answered that the object of coloring it is so as to make it uniform.

Mr. BETHEA: Yes, he stated that. Now I move to strike out his testimony, as irrelevant and immaterial & incompetent.

The COURT: Of course as an abstract proposition, it is hard to see why there should be any difference between coloring oleomargarine and coloring butter; but I cannot see but that the Congress, in the exercise of its police powers, for various purposes, among which might be the assistance in detecting the difference between butter and oleomargarine, and other purposes incident to the detection of oleomargarine to prevent imposition on the public——

Mr. KEARFUL: Pardon me one moment, if your honor will.

The COURT: Yes.

Mr. KEARFUL: I suggest that ruling upon this objection might be reserved until the evidence is all in, when the matter can be argued and the points presented.

The COURT: Have you got more evidence on this point?

Mr. KEARFUL: Yes sir.

The COURT: I thought you were through. I think I am
28 sufficiently advised on the point now, and will say that for the purpose of this hearing the testimony may be stricken out.

To which ruling of the court the defendant, by his counsel then and there duly excepted, which exception was duly allowed.

ANDREW AMUNDSEN, a witness produced, sworn and examined on behalf of defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Andrew Amundsen. I live at 1201 Milwaukee avenue. I am in the butter and butterine business. I started five or six years ago in butter, and I could not make any success of that, so I went into butterine, and I increased it and doubled it every year, up till July 1st, 1902, when I was selling 2600 pounds a week, and when the law went into effect, there was an eruption throughout the whole trade. Every customer I had quit. They didn't want it. When I came around with white butterine, they would try it once and the next time I came around they met me in the door and said "We don't want any more of your lard." Then I

tried with butter, and of course the majority of my trade now they take one pound of butterine for cooking purposes, while they take two or three pounds of butter for table use. The butterine I
29 sold came from the Wm. J. Moxley factory.

Q. What class of people did you supply with oleomargarine?

A. Well, the laboring class, the majority of them, you might say all of them, the laboring class. They knew it was oleomargarine and not butter, and they bought it because it was cheaper than butter.

Q. What districts of Chicago did you supply?

A. Well, I go as far as Dakota street, and over to Lake and over to Brighton park, and Dakota street over on the West side, Irving park and Garfield park, and then to Lake avenue, all around.

Mr. BETHEA: I move to strike out the testimony of the witness as incompetent, irrelevant and immaterial.

The COURT: It may go out.

To which ruling of the court defendant, by counsel, then and there duly excepted, which exception was duly allowed.

CHARLES F. IZARD, a witness produced, sworn and examined on behalf of the defendant, testified as follows:

Direct examination by Mr. KEARFUL:

My name is Charles F. Izard. I am in the restaurant business, located at 163 and 165 West Madison street, Chicago, and have been in the restaurant business for two years last April. I have
30 used oleomargarine in my restaurant almost exclusively, except for cooking, up to July 1, 1902. Since that time we cannot use it. The reason is that people object to the color of it. They do not like the looks of it. It don't seem to give them satisfaction because it is white. Since July 1st, 1902, we have been using colored butter.

Cross-examination by Mr. BETHEA:

Q. Didn't they object or didn't they use the butterine where it was colored because they thought it was butter?

A. Why, they had no objection to butterine except when it came white, except it was white. They had no complaint to find with the oleomargarine that had color in it. It was after it came white they were objecting to using or eating it.

Q. Why didn't you buy the colored oleomargarine when they objected to the white?

A. Well, we had to do that, of course.

Q. That cost ten cents a pound more?

A. Yes sir.

31 Q. Is that what you buy now?

A. Well, sometimes we buy that and sometimes we buy this here other.

Q. White?

A. No, not the white, colored butter. We cannot use white at all.

Redirect examination by Mr. KEARFUL:

Q. Do you use white oleomargarine for any other purpose than for use on the table?

A. We use it for cooking where we don't use lard.

Q. What proportion of the colored article that you now buy is oleomargarine and what proportion is butter?

A. We do not use any oleomargarine now excepting we happen to run out of butter or something of that kind. In the case of an emergency we buy it.

Q. What is the reason you don't buy it now as formerly?

A. Well, it depends upon how much we have, that is, how much the man has on hand that happens to come along that we buy it from; something of that kind. We have objection to this ordinary oleomargarine. We have no objection to the oleomargarine that is colored at all. It gives perfect satisfaction.

Recross-examination by Mr. BETHEA:

Q. Can you get good butter now cheaper than you can get this colored oleomargarine?

A. No sir.

32 Q. Do you know what the difference is in the price?

A. Well, it varies considerably. It depends upon the quantities you buy and whom you buy it from.

Q. How much, about how much?

A. Oh, it may vary a couple of cents.

Mr. BETHEA: We move to strike out the testimony of this witness on the ground that it is incompetent, irrelevant and immaterial.

The COURT: Let it go out.

To which ruling of the court the defendant by his counsel then and there duly excepted, which exception was duly allowed.

JOHN DADIE, called and sworn as a witness on behalf of the defendant testified as follows:

Direct examination by Mr. KEARFUL:

My name is John Dadie. I am secretary of the William J. Moxley corporation. That corporation is engaged in the manufacture of oleomargarine or butterine for sale in various parts of the United States. It manufactured the article involved in this case.

The COURT: Do you use "oleomargarine" and "butterine" interchangeably?

A. We call it oleomargarine legally. In trade it is known as butterine.

Mr. PAGIN: The law defines oleomargarine to be butterine

33 and certain things called by other names so that the legal term is oleomargarine.

The WITNESS: Oleomargarine or butterine is designed to be used as a substitute for butter, and we color it as butter is colored in order

to compete with it. I have been engaged in the business of manufacturing oleomargarine since 1884. The capacity of the Moxley factory is in the neighborhood of three to four million pounds per month. It is the largest in the United States. Previous to July 1, 1902, the total output sometimes reached but never exceeded about 2,000,000 pounds per month. The output since July 1st, 1902, has varied from 500,000 to 1,000,000 pounds per month. From my knowledge of the manufacture of this article I know that it cannot be manufactured and sold at a profit in competition with butter if the ten-cent tax is paid. This opinion is based largely upon our experience in manufacturing artificially colored goods upon which we are compelled to pay a tax of ten cents a pound. During the first five months of the present fiscal year, beginning July 1, 1901, we failed to sell any of it at all. During the month of December we did manufacture and sell 37,594 pounds of artificially colored butterine or oleomargarine upon which the ten-cent tax was paid. The article turned out by our factory, previous to July 1st, 1902, was all of it artificially colored. The uncolored article which we now put out is sold at the present time in its uncolored state largely to the poorer people, and so far as we are able to
34 ascertain, it is displacing lard and is used for cooking purposes rather than for table use.

Q. Will you state if you know why you have been able to sell some colored oleomargarine upon which you have paid the ten-cent tax during the month of December, although you say that you cannot manufacture this article and sell it at a profit in competition with butter if you pay the tax?

A. For the reason that the price of natural butter during the month of December has been extremely high. The market has reached 29 cents a pound, and under these conditions we have been able to manufacture and sell artificially colored oleomargarine upon which the ten-cent tax was paid, at the price of 24 cents a pound. Now, if the price of butter should drop back to the normal condition of 24 and 25 cents, and I believe that it has within the last few days, we would be practically unable to compete with it in oleomargarine. The average price for butter the year round is approximately in the neighborhood of 25 cents a pound. I am speaking now of the best grades of creamery butter. Dairy butter is considered of a poorer grade, and is sold for considerably less money.

Cross-examination by Mr. PAGIN:

Q. How long prior to July 1st, 1902, were you in the business of manufacturing oleomargarine?

A. Since 1884.

35 Q. You said that the output of your factory never exceeded 2,000,000 per month before that date?

A. Yes sir.

Before July 1st, 1902, for twelve months before that time, I think the average output would approximate to one and a half million pounds a month. Since that date, July, August, September, 1902,

we sold one million and a half pounds for the whole period; and October, November and December we sold two and a half million pounds for that period. Before July 1st, 1902, we used only the Wells-Richardson improved butter color to produce an artificial coloration. Since that date we have been using the same article. We have used some palm oil. We used that for a few days only until the Commissioner of Internal Revenue ruled that its use would subject the product to the ten-cent tax. Prior to July 1st, 1902, we had only experimented with it.

Redirect examination by Mr. KEARFUL:

The reason why the uncolored oleomargarine has displaced lard and other substances for cooking purposes is because the price of the two articles is practically the same. At the present time they are selling lard at ten and a quarter cents a pound and butterine at twelve and a half, and the articles being near the same price, oleomargarine displaces lard, because it is preferable for cooking purposes. The price of lard at the present time is considered remarkably high. It usually sells from seven to eight cents a pound at this time of the year, and if it should fall to that price the
36 market for uncolored oleomargarine would be greatly reduced. As to whether we could manufacture and put on the market oleomargarine at eight cents a pound, that would depend altogether on the price of the ingredients that go to make up oleomargarine, but it would be highly improbable. At the present time the price of the raw material is unusually high.

Thereupon the Government by its counsel moved to strike out the testimony of the witness; which motion was allowed by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted, which exception was duly allowed.

Thereupon the defendant rested.

Thereupon the Government, in rebuttal, introduced the following evidence:

JOSEPH A. PAINTER, recalled on behalf of the Government, testified as follows:

Direct examination by Mr. BETHEA:

Q. Mr. Painter, have you made yourself acquainted with the market here in reference to the kind of butter that has been sold the last two years or is being sold now?

A. I am very well acquainted with it, yes sir.

Q. What is the fact about there being any butter sold in the natural condition or offered for sale?

37 A. Natural condition?

Q. Yes, uncolored?

A. Uncolored?

Q. Yes.

A. Well, there is some uncolored butter in the market which is

confined, I believe, entirely as far as I am aware, to the Jewish settlement—sweet butter, we call it, unsalted.

Q. You do not know how much the sale of it is limited?

A. I never found it in any other locality except in the Jewish settlement. I never found it anywhere else in the city.

Q. You do not know but they may sell that at the good hotels and restaurants and cafés here to people that want it?

A. Why, they may.

Q. Have you independently any knowledge as to what kind of butter is used part of the time at the best hotels?

A. I do not know.

Thereupon the Government rested in rebuttal.

The above and foregoing transcript contains all the evidence introduced, or offered to be introduced, on the trial of said cause.

38 Thereupon the defendant moved the court to find in favor of the defendant and to render a verdict and judgment of not guilty and to discharge the defendant, which motion is in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } *ss:*

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA }
vs. } Information.
WILLIAM BROADWELL. }

Motion to Find Defendant Not Guilty.

Comes now the defendant, by his counsel, and upon the evidence before the court moves the court to find in favor of the defendant and to render a verdict and judgment of not guilty, and that he be discharged because the act of Congress relating to butter and oleomargarine of August 2, 1886, as amended by the act of Congress of May 9, 1902, is in contravention of the Constitution of the United States and of the amendments thereto and is illegal and void, for the following reasons, to wit:

First. The act deprives the defendant and the oleomargarine manufacturers and dealers in the United States of their lib-
39 erty and property without due process of law.

Second. The act is an unlawful encroachment upon and interference with the police powers reserved to the several States and to the people of the United States;

Third. The act invests inferior executive officers with the power finally and arbitrarily to determine essentially judicial questions concerning vast property rights;

Fourth. The act so arbitrarily discriminates against the oleomargarine industry in favor of the butter industry in the United States

as to be repugnant to those fundamental principles of equality and justice which are inherent in the Constitution of the United States.

Dated January 22, 1903.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Mr. KEARFUL: Upon this motion we should like to be heard.

The COURT: I do not think I want to hear you. I think it is a matter so peculiarly for the Supreme Court that it should go there. I might say that it seems to me to call for the decision of that court upon the constitutionality of the act. I think the matter is well worthy of consideration. I do not think that this court, however, should go back of the statute.

Mr. KEARFUL: I will concede, your honor, if you will per-
40 mit me, that it would be entirely proper in case of a statute of doubtful constitutionality for the lower court to hold a statute constitutional and let the Supreme Court pass upon it, but I believe that it is the established rule that if the statute is so clearly unconstitutional that it can be demonstrated to the court, it should be so held by that court. And while the rule is different in the case of a doubtful statute, to my mind there is no doubt here and I believe *and* I can show the court the reasons which may induce it to believe as I do, that there is no doubt of the unconstitutionality of the statute.

The COURT: No sir, I think this matter should go to the Supreme Court and there be decided. The statutes are not so doubtful in my mind as to warrant me in holding that they are unconstitutional. I therefore overrule the motion and find the defendant guilty.

To which ruling and finding of the court the defendant, by his counsel, then and there duly excepted; which exception was duly allowed.

Thereupon, the defendant presented and filed the following motion for a new trial:

41 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
WILLIAM BROADWELL. } Information.

Motion for New Trial.

Now comes the defendant and moves the court to set aside the finding of guilty herein and to grant a new trial of said cause for the following reasons, to wit:

(1.) The finding is contrary to the evidence.
(2.) The finding is contrary to the law.
(3.) The court struck out and refused to consider proper evidence offered and received on behalf of the defendant.

Dated January 22, 1903.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Which motion was by the court overruled; to which ruling the defendant by his counsel then and there duly excepted; which exception was by the court duly allowed.

42 Thereupon, the defendant, by his counsel, presented and filed a motion in arrest of judgment upon the same grounds as those specified in his foregoing motion to find the defendant not guilty; which grounds the counsel for the respective parties agree may be here considered as inserted herein; which motion in arrest of judgment was by the court overruled; to which ruling, the defendant, by his counsel, then and there duly excepted; which exception was by the court duly allowed.

Thereupon, the defendant, being present in open court, the court pronounced its judgment upon the aforesaid finding of guilty and adjudged that the defendant pay a fine of fifty dollars ($50.00) and costs, and that execution issue therefor.

Thereupon, the defendant, by his counsel, gave oral notice in open court of his intention to apply for a writ of error to review said judgment and proceedings in the Supreme Court of the United States, and prayed for a stay of execution to enable him to prepare and file a bill of exceptions.

Thereupon, the court ordered execution of said judgment to be stayed for a period of twenty days and allowed the defendant twenty days within which to prepare and file a bill of exceptions.

43 And now in furtherance of justice and that right may be done, the defendant presents the foregoing as his bill of exceptions in this case, and prays that the same may be settled and allowed and signed and certified by the judge as provided by law.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

The foregoing bill of exceptions is true in all respects and is hereby approved, allowed and settled and made a part of the record herein.

Done in open court at the December term, 1902, and dated this 27 day of January, 1903.

KOHLSAAT, *Judge.*

Endorsed: 3416. U. S. dist. court, nor. dist. of Ill. The United States *vs.* William Broadwell. Bill of exceptions. Filed Jan. 27, 1903 at 10 o'clock a. m. T. C. MacMillan, clerk.

44 And afterwards, to wit, on the 27th day of Jan., A. D. 1903, there were filed in the clerk's office of said court in the above-entitled cause, a petition for writ of error and assignment of errors; the same being in the words and figures following to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA
vs.
WILLIAM BROADWELL. } 3416. Information.

Petition for Writ of Error.

And now comes William Broadwell, defendant herein, and says that on the 22nd day of January, 1902, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf returnable in the Supreme Court of the United States, for the correction of the errors so complained of, that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States, and that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and
45 that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

46 UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division. }

In the District Court, December Term, A. D. 1902.

UNITED STATES OF AMERICA }
vs. } Information.
WILLIAM BROADWELL. }

Assignment of Errors.

The defendant in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of the cause, to wit:

I.

Error in refusing to hold that the provisions of the act of Congress relating to oleomargarine and butter, of August 2, 1886, as amended by the act of Congress of May 9, 1902, under which the defendant was prosecuted, are in contravention of the Constitution of the United States and the amendments thereto, because:

47 (1.) The said provisions deprive the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law.

(2.) The said provisions constitute an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States.

(3.) The said provisions invest inferior executive officers with the power finally and arbitrarily to determine essentially judicial questions concerning vast property rights.

(4.) The said provisions so arbitrarily discriminate against the oleomargarine industry in favor of the butter industry in the United States as to be repugnant to the fundamental principles of equality and justice inherent in the Constitution of the United States.

II.

Error in striking out and refusing to consider proper evidence offered and received on behalf of the defendant, showing:

(1.) That the natural color of butter varies at different seasons of the year from almost pure white in the winter season to a high shade of yellow in the spring season, if made from the milk

48 of grass or clover fed cows; and that all butter during all seasons of the year, including that made from the milk of grass or clover fed cows, is uniformly colored a shade of yellow somewhat deeper than the natural color of June butter, before it is put on the market;

(2.) That there is no demand in the market for butter having only its natural color, except June butter, and that there is no demand in the market for oleomargarine for table use unless

the same is colored a shade of yellow which causes it to look like yellow butter.

(3.) That oleomargarine is a substitute for and competes with butter, and that the market demand for both butter and oleomargarine requires that they shall have a uniform color of a shade of yellow during all seasons of the year.

(4.) That the cost of production of oleomargarine is such that after payment of a tax of ten cents per pound thereon, as required by the act of Congress relating to butter and oleomargarine, of August 2, 1886, as amended by the act of Congress of May 9, 1902, the same cannot be sold in competition with butter.

(5.) That the operation and effect of said act of Congress relating to butter and oleomargarine are to prevent the people of the United States from obtaining oleomargarine in the condition in which
49 they want it and to destroy the oleomargarine industry in the United States and unjustly to discriminate against the same in favor of the butter industry.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Endorsed: U. S. district court Northern district of Ill. Northern division. Petition for writ of errors and assignment of errors. United States of America *ex.* William Broadwell. No. 3416. Filed Jan. 27, 1903, at 10 o'clock a. m. T. C. MacMillan, clerk.

50 And afterwards, to wit, on the 27th day of January A. D. 1903, the following order was made and entered of record in said cause, before the Hon. Christian C. Kohlsaat, judge, to wit:

UNITED STATES OF AMERICA }
ex. } 3416.
WILLIAM BROADWELL. }

This 27th day of January A. D. 1903, came the defendant by his attorney, and filed herein his petition for a writ of error and an assignment of errors, to have reversed in the Supreme Court of the United States the judgment heretofore entered herein, and thereupon the court does allow the the said writ of error upon the defendant giving bond according to law in the sum of five hundred dollars, which bond shall operate as a supersedeas and stay of execution upon said judgment.

51 And afterwards, to wit, on the 27th day of January, A. D. 1903, there was filed in the clerk's office of said court, a bond on writ of error, the same being in the words and figures following, to wit:

United States of America,
Northern District of Illinois, Northern Division.

In the District Court, December Term, A. D. 1902.

United States of America
vs.
William Broadwell. } 3426. Information.

Bond on Writ of Error.

Know all men by these presents, that we, William Broadwell as principal, and William J. Mosley as surety, are held and firmly bound unto the defendant in error, The United States of America, in the full and just sum of five hundred dollars ($500) to be paid said defendant in error, The United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seal and dated this 20th day of January in the year of our Lord one thousand nine hundred and three.

52 Whereas, lately at a district court of the United States of America, for the northern district of Illinois northern division, in a suit pending in said court between The United States of America, plaintiff, and William Broadwell, defendant, a judgment was rendered against the said William Broadwell, and the said William Broadwell having obtained a writ of error and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, defendant in error, citing and admonishing it to appear at a session of the Supreme Court of the United States to be holden at the city of Washington in the District of Columbia, on or before the 20th day of February next;

Now the condition of the above obligation is such that if the said William Broadwell shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make said plea good then the above obligation to be void; else to remain in full force and virtue.

WILLIAM BROADWELL. [SEAL.]
WILLIAM J. MOSLEY. [SEAL.]

Sealed and delivered in the presence of
FRANCIS J. KEARFUL.
JOHN DADE.

Approved this 27 day of January, A. D. 1903.

KOHLSAAT,
United States District Judge.

Endorsed: No. 3426. District court of the northern district of Illinois, northern division. United States vs. William Broadwell. Bond on writ of error. Filed Jan. 27, 1903 at 10 o'clock a. m. T. C. MacMillan, clerk.

53 And afterwards, to wit, on the 28th day of January, A. D. 1903, there was filed in the clerk's office of said court, in the above-entitled cause, a præcipe for record, the same being in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } ss:

In the District Court of the United States, December Term, A. D. 1902.

UNITED STATES OF AMERICA }
vs. } Information. 3416.
WILLIAM BROADWELL. }

Præcipe for Record.

The clerk of said court will make up an authenticated and complete transcript of the record in the above-entitled cause.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
Attorneys for Defendant.

Endorsed: No. 3416. District court of the United States. Northern district of Illinois. Northern division. United States of America *vs.* William Broadwell. Præcipe for record. Filed Jan. 28, 1903. T. C. MacMillan, clerk.

54 NORTHERN DISTRICT OF ILLINOIS, }
Northern Division, } ss:

I, T. C. MacMillan, clerk of the district court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said court and made in accordance with præcipe filed in the cause entitled The United States *vs.* William Broadwell as the same appear from the original records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago in said district and division, this second day of February A. D. 1903.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN, *Clerk.*

55 And afterwards, to wit, on the 27th day of January, A. D. 1903. there was filed in the clerk's office of said court in the above-entitled cause, a writ of error; same being in the words and figures following—to wit:

Writ of Error.

UNITED STATES OF AMERICA, *ss* :

The President of the United States to the Honorable Christian C. Kohlsaat, judge of the district court of the United States for the northern district of Illinois, northern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States of America, plaintiff, and William Broadwell, defendant, wherein was involved the construction and application of the Constitution of the United States, and wherein the constitutionality of a law of the United States was drawn in question, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at the city of Washington, on the 26th day of February next, that, the record and proceedings aforesaid being in-
56 spected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of January in the year of our Lord, one thousand nine hundred and three.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois, Northern Division.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a true and complete copy of the record and all proceedings in the foregoing-entitled cause as witness my hand and official seal this 2nd day of February A. D. 1903.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois.

Copy deposited for the defendant in error in the office of the clerk of the district court of the United States for the northern district of Illinois.

[Endorsed:] Writ of error. Filed Jan. 27, 1903 T. C. MacMillan clerk.

57 *Citation.*

Supreme Court of the United States.

UNITED STATES OF AMERICA,
District Court of the Northern District of Illinois, Northern Division, } ss:

To the United States of America and Solomon H. Bethea and Oliver E. Pagin, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, on the 26th day of February next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the northern district of Illinois, northern division, wherein William Broadwell is plaintiff in error and The United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 27th
58 day of January, A. D. 1903, and of the Independence of the United States the one hundred and twenty-seventh.

KOHLSAAT,
Judge of the District Court of the United States for the Northern District of Illinois, Northern Division.

Attest: T. C. MACMILLAN, *Clerk.*

Service of the within citation and receipt of a copy thereof admitted this 27th day of January, 1903.

S. H. BETHEA,
U. S. Att'y, Attorney for Defendant in Error.

Filed Jan. 27, A. D. 1903.

T. C. MACMILLAN, *Clerk.*

Endorsed on cover: File No. 18,844. N. Illinois D. C. U. S. Term No. 616. William Broadwell, plaintiff in error, *vs.* The United States. Filed February 24, 1903.

FILE COPY.

Supreme Court of the United States,

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
FEB 28 1903
JAMES H. McKENNEY,
Clerk.

AUGUST CLIFF,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 634. 221

Error to the District Court for the Northern District of Illinois, Northern Division.

FREDERICK J. SCHICK,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 635. 222

Error to the District Court for the Northern District of Illinois, Northern Division.

WILLIAM BROADWELL,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 636. 223

Error to the District Court for the Northern District of Illinois, Northern Division.

MOTION TO UNITE CASES AND ADVANCE FOR HEARING UNDER RULE 20.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
of counsel for plaintiff in error in each case.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

AUGUST CLIFF, *Plaintiff in Error,* vs. UNITED STATES OF AMERICA, *Defendant in Error.*	No. 614. Error to the District Court for the Northern District of Illinois, Northern Division.
FREDERICK J. SCHICK, *Plaintiff in Error,* vs. UNITED STATES OF AMERICA, *Defendant in Error.*	No. 615. Error to the District Court for the Northern District of Illinois, Northern Division.
WILLIAM BROADWELL, *Plaintiff in Error,* vs. UNITED STATES OF AMERICA, *Defendant in Error.*	No. 616. Error to the District Court for the Northern District of Illinois, Northern Division.

NOTICE OF MOTION TO UNITE CASES AND ADVANCE FOR HEARING UNDER RULE 26.

Notice is hereby given that the annexed motion to unite the above entitled cases for hearing and to advance the same upon the docket, under

sections 3, 5, 6, 7 and 8 of rule 26, will be presented, upon the records in said cases, to the Supreme Court of the United States, at the Capitol, in the City of Washington, on Monday, the 2nd day of March, 1903, at the coming in of the court on that day, or as soon thereafter as counsel can be heard.

WASHINGTON, D. C., February 24, 1903.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
of counsel for plaintiff in error in each case.

To PHILANDER C. KNOX,
Attorney General.

Due and timely service of the above motion is hereby admitted.

Attorney General.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

AUGUST CLIFF, *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error.*	No. 614. Error to the District Court for the Northern District of Illinois, Northern Division.
FREDERICK J. SCHICK, *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error.*	No. 615. Error to the District Court for the Northern District of Illinois, Northern Division.
WILLIAM BROADWELL, *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error.*	No. 616. Error to the District Court for the Northern District of Illinois, Northern Division.

MOTION TO UNITE CASES AND ADVANCE FOR HEARING UNDER RULE 26.

Upon the records in the above entitled cases, the plaintiff in error in each case moves that said cases be heard together and advanced upon the docket of

the court, and respectfully submits the following reasons why the motion should be granted, viz.:

I.

Each of these cases, to a certain extent, involves the same question, namely, the constitutionality of the act of Congress of August 2, 1886, relating to butter and oleomargarine, as amended by the act of Congress of May 9, 1902, and, therefore, "may, by leave of court, be heard together" and "argued as one case," in accordance with section 8 of rule 26.

The record in each case shows that the constitutionality of certain portions of this law of the United States is drawn in question and that the grounds upon which it is assailed are substantially similar in each case.

II.

Each of these cases is a criminal case, and, therefore, "may be advanced by leave of court on motion of either party," in accordance with section 3 of rule 26.

The record in each case shows that the defendant was prosecuted by information under Section 11 of the Act of Congress of August 2, 1886, relating to butter and oleomargarine, as amended by the Act of Congress of May 9, 1902, and, in each case, was found guilty and adjudged to pay to the United States a penalty of fifty dollars and costs.

III.

Each of these cases is a revenue case in which the United States is very largely concerned, and also involves and affects matters of general public interest, and, therefore, "may also by leave of court be advanced on motion of the attorney-general," in accordance with Section 3 of Rule 26.

The record in each case shows that the defendant assails the constitutionality of the act of Congress of August 2, 1886, relating to butter and oleomarga-

cise, as amended by the act of Congress of May 8, 1902, which act imposes a tax of ten cents per pound upon oleomargarine containing "artificial coloration which causes it to look like butter," and authorizes the Commissioner of Internal Revenue

tax law, to reduce the revenues of the Unites States government at the rate of more than $1,000,000 per annum.

Upon these facts, the plaintiff in error in each case contended in the court below, and now in his assignments of error shows, that the provisions of the act in question deprive him and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law, constitute an unlawful encroachment upon the police powers reserved to the several states and to the people of the United States, vest in an inferior administrative officer final and arbitrary power to determine an essentially judicial question, and is repugnant to the fundamental principles of equality and justice inherent in the Constitution of the United States.

The court below evidently was impressed with the fact that these cases involved matters of general public interest. Had the position of the plaintiffs in error been sustained, the cases, being criminal, could not have come to this court. Consequently, their contention in each case was overruled, with the observation that the case presented questions so peculiarly for the Supreme Court as to call for its decision thereon, and that, though the questions presented were well worthy of consideration, the statute was not so clearly unconstitutional as to warrant a lower federal court, in such a case, in so holding it.

During the past twenty years this court has been so many times called upon to consider legislation affecting the rights of oleomargarine producers and dealers in the United States that it would seem to be unnecessary to call attention to the extent and importance of the oleomargarine industry, and it needs no argument to establish the proposition that a case involving the power of Congress to destroy that industry, without compensation and for purposes other than public purposes, involves matters of general public interest. One instance shown by

the record is that of the Wm. J. Moxley factory in Chicago, which, with a capacity of over 3,000,000 pounds per month, produced and sold during the last year under the old law about 2,600,000 pounds per month, upon which the tax of 2 cents per pound was paid, and, during the first six months under the new law, produced and sold only about 37,594 pounds for the entire period, upon which the tax of 10 cents per pound was paid. The reason for this ruinous decrease was shown to be that the addition of eight cents per pound to the cost of production prevented oleomargarine from competing with butter. This is illustrated by the instance of the witness Amundsen, a retail dealer, who supplied the laboring classes in Chicago with oleomargarine under the old law. His customers "knew that it was oleomargarine and not butter, and they bought it because it was cheaper than butter." But when the 10 cent tax was paid it was cheaper to buy butter, and they would not have the uncolored article. As a consequence, to use his own expression, "every customer I had quit." The truth of these instances, among many, is unchallenged, and they are cited to show that the position of the plaintiffs in error is based upon established facts. When, therefore, it is considered that the object of this act of Congress, as demonstrated by the undisputed and indisputable evidence of its operation, is to suppress the production and sale of oleomargarine as a cheap, wholesome and satisfactory substitute for butter, the conclusion that the public interest is very seriously affected is believed to be unavoidable.

Moreover, aside from the individual liberty and property rights directly involved, the general public must needs be deeply interested in maintaining a just competition between oleomargarine and butter, and in maintaining the opportunity of the poorer classes who cannot afford to purchase high priced butter to obtain a cheap, wholesome and satisfactory substitute therefor. Again, the people of every state have enacted laws regulating the

manufacture and sale of oleomargarine, and, undoubtedly there is a general public interest in the question whether such enactments are within the powers committed to Congress or whether they are within the powers reserved to the states respectively or to the people.

IV.

The plaintiff in error in each case therefore prays that said cases may be heard together and advanced for argument as one case to as early a day as may be convenient for the Court.

Notice of this motion has been served on the Attorney General of the United States.

WASHINGTON, March 2, 1903.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
CHARLES C. CARNAHAN,
DELAVAN B. COLE,
of counsel for plaintiff in error in each case.

FILE COPY
Office Supreme Court
FILED
OCT 3 1903
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

AUGUST CLIFF, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 614, October Term, 1902. No. 221, October Term, 1903.
FREDERICK J. SCHICK, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 615, October Term, 1902. No. 222, October Term, 1903.
WILLIAM BROADWELL, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 616, October Term, 1902. No. 223, October Term, 1903.
LEO W. MCCRAY, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Southern District of Ohio.	No. 301, October Term, 1903.

BRIEF FOR PLAINTIFFS IN ERROR.

WILLIAM D. GUTHRIE,
MILLER OUTCALT,
CHARLES E. PRIOR,
FRANCIS J. KEARFUL,
DELAVAN B. COLE,
CHARLES C. CARNAHAN,
Of counsel.

Washington, October Term, 1903.

20455

[18,842. 18,843. 18,844. 18,952.]

OLEOMARGARINE TAX CASES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

AUGUST CLIFF, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 614, October Term, 1902. No. 221, October Term, 1903.
FREDERICK J. SCHICK, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 615, October Term, 1902. No. 222, October Term, 1903.
WILLIAM BROADWELL, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 616, October Term, 1902. No. 223, October Term, 1903.
LEO W. MCCRAY, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Southern District of Ohio.	No. 301, October Term, 1903.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

The above entitled cases draw in question the constitutionality of certain provisions of the act of Congress commonly called the "Oleomargarine Act," and en-

titled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," approved August 2, 1886, as supplemented by section 41 of the act of October 1, 1890, and as amended by the act of May 9, 1902 (24 Stat. 209, c. 840; 26 Stat. 621, c. 1244, § 41; 32 Stat. 193, c. 784), on the ground that they interfere with the reserved power of the States to regulate their internal commerce, deprive the individual of liberty and property without due process of law, and confer final judicial power upon an administrative officer.

The plaintiffs in error *Cliff*, *Schick* and *Broadwell* were prosecuted by information in the District Court of the United States for the northern district of Illinois (*Ex parte Wilson*, 114 U. S. 417, 425; *Lees* v. *United States*, 150 U. S. 476, 479) for the offense of having purchased or received for sale oleomargarine which had not been "stamped according to law" under section 11 of the act. In the case of *McCray*, the government instituted in the District Court of the United States for the southern district of Ohio a civil suit under the same section of the act, for the recovery of the penalty therein provided. *Helwig* v. *United States*, 188 U. S. 605, 610.

The title of the amendatory act defines the general object of the legislation as follows (32 Stat. pt. 1, p. 193):

> "An Act to make oleomargarine and other imitation dairy products subject to the laws of any State, or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an Act entitled 'An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, im-

portation, and exportation of oleomargarine,' approved August second, eighteen hundred and eighty-six."

The act, as amended, consists of 21 sections. Section 1 defines butter as follows (24 Stat. 209):

> "That for the purposes of this act the word 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and *with or without additional coloring matter*."

Section 2 defines oleomargarine as follows (24 Stat. 209):

> "That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil, *annotto, and other coloring matter*, intestinal fat, and offal fat, *made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter*."

Section 3 imposes special taxes on manufacturers, wholesale dealers and retail dealers in oleomargarine, and section 4 prescribes heavy penalties for their nonpayment. Section 5 provides for regulation of the business of manufacturing oleomargarine by the Commissioner of Internal Revenue, places the conduct of such business under "surveillance of officers and agents" of the Commissioner, and requires each manufacturer to give a bond in the penal sum of not less than five thousand dollars, which "may be increased

from time to time, and additional sureties required at the discretion of the collector, or under instructions of the Commissioner of Internal Revenue." Section 6 provides for the packing, marking, stamping and branding of oleomargarine by manufacturers as prescribed by regulations of the Commissioner with the approval of the Secretary of the Treasury, and provides penalties for the enforcement of such regulations. Section 7 requires the manufacturer of oleomargarine to affix to each package of the article sold or offered for sale the usual internal revenue label containing a caution not to use the same package or the same label thereon again.

Section 8, as amended by section 3 of the act of May 9, 1902, imposes the tax in question in the following language (32 Stat. pt. 1, p. 194):

> "That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *Provided, That oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow and the tax shall be one-fourth of one cent per pound.*"

Section 9 provides for assessment of taxes on oleomargarine which has been sold or removed for sale "without the use of the proper stamps." Section 10 imposes a tax of fifteen cents per pound upon imported oleomargarine in addition to the duty. Section 20 prescribes the penalty judicially imposed in the cases at bar, as follows (32 Stat. 211):

> "That every person who knowingly purchases or receives for sale any oleomargarine which has

...any liquor furnished or stamped according to law shall be liable to a penalty of fifty dollars for each such offense."

Section 12 imposes a penalty for purchasing or receiving for sale any oleomargarine from any manufacturer who has not paid the special tax. Section 13 provides for the destruction of stamps on empty packages. Section 14 provides for the employment of chemists and microscopists by the Commissioner of Internal Revenue for decision by said Commissioner as to whether any oleomargarine is deleterious to health, for an appeal from such decision to a board "composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Commissioner of Agriculture," whose decision shall be final, and also confers power on the Commissioner of Internal Revenue as follows:[1] [2]

> "And such Commissioner is authorized to establish such regulations, examine witnesses, and require proofs which may be necessary for the ingression to examine such cases as he may deem advisable, and his decision in matters of fact in such cases shall be final."

Section 15 provides for inspection by the United States of all oleomargarine found not to be deleterious to health or not stamped or marked as provided by the act, and also forbids the removal or delivery of stamps on packages of oleomargarine. Section 16 provides for removal of oleomargarine for export without tax. Section 17 makes any manufacturer who "defrauds or attempts to defraud the United States of the tax on the oleomargarine produced by him or any part thereof" with forfeiture of his factory, manufacturing apparatus and all oleomargarine

and raw material found on the premises, and by fine not exceeding five thousand dollars and imprisonment for not more than three years. Section 18 punishes by a penalty of one thousand dollars, and forfeiture of all oleomargarine owned by the offender if he be a manufacturer, all failures to comply with the act not otherwise punished. Section 19 provides "that all fines, penalties and forfeitures imposed by this act may be recovered in any court of competent jurisdiction." Section 20 provides "that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act." Section 21 of the original act provides for its going into effect ninety days after its passage, and the act, as amended (under the last section of the act of May 9, 1902), went into effect on July 1, 1902.

On the trial of each case, it was contended by the defendant that, in so far as this act imposes a tax of ten cents per pound on oleomargarine containing "artificial coloration that causes it to look like butter of any shade of yellow," it was in contravention of the Constitution of the United States and the amendments thereto, because it constituted an invasion of the powers reserved to the several States and deprived him and the oleomargarine manufacturers and dealers in the United States of liberty and property without due process of law. In the *Cliff* and *McCray* cases it was contended also that the act was unconstitutional in so far as it authorizes the Commissioner of Internal Revenue "to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in con-

tested cases are to be taxed under this act," and provides "that his decision in matters of taxation under this act shall be final," on the ground that it delegates to an inferior administrative officer the power finally to determine an essentially judicial question. Notwithstanding these contentions, judgment was rendered in favor of the government imposing the statutory penalty of fifty dollars in each case (*Cliff* record, pp. 22–24; *Schick* record, pp. 19–21; *Broadwell* record, pp. 19–21; *McCray* record, pp. 5–7). Thereupon, the cases were brought direct to this court by writ of error under authority of section 5 of the judiciary act of March 3, 1891, as involving the construction or application of the Constitution of the United States and also as cases in which the constitutionality of a law of the United States was drawn in question. 26 Stat. 827, c. 517; *Motes* v. *United States*, 178 U. S. 458, 466; *Fairbank* v. *United States*, 181 U. S. 283, 284.

In the *Cliff* case, the Government showed that the defendant was a general grocer and retail dealer in oleomargarine in Chicago; that on December 22, 1902, he had in his possession a ten pound package of oleomargarine of a color resembling June butter and bearing a tax-paid stamp at the rate of one-fourth of one cent per pound; that the article was composed of oleo oil, neutral lard, cotton-seed oil, milk, common salt and palm oil; that the color of June butter was imparted to it by the palm oil it contained; that the oleomargarine had been manufactured in the month of December, 1902, by Wm. J. Moxley, Incorporated, factory No. 5, at the corner of Clinton and Randolph Streets,

in the City of Chicago, State of Illinois; that the package was put up, marked, stamped and branded in every respect in accordance with the acts of Congress relating to oleomargarine and the regulations of the Secretary of the Treasury and the Commissioner of Internal Revenue except that it bore only a tax-paid stamp of one-fourth of one cent per pound, and that the defendant admitted to the collector at that time that he purchased and received from the Moxley Company the oleomargarine in question for the purpose of sale as oleomargarine, knowing its character and ingredients and the amount of tax paid thereon (*Cliff* record, p. 8).

In the *Schick* case substantially the same showing was made, except that it appeared that the package of oleomargarine involved in that case admittedly contained 'artificial coloration,' namely, Wells-Richardson's Improved Butter Color, and that the package bore only a tax-paid stamp at the rate of two cents per pound (*Schick* record, p. 8).

In the *Broadwell* case the same showing as in the *Schick* case was made, except that the package of oleomargarine bore no stamp and no tax had been paid on it (*Broadwell* record, p. 8).

The operation and effect of the act were shown by undisputed evidence offered and adduced on behalf of the defendant in each case, as follows:

Oleomargarine is designed to be used as a substitute for butter and to that end is colored as butter is colored. There is substantially no difference between yellow oleomargarine and yellow butter. They are identical as to the chemical elements of each, except only a slight difference in proportion. They each con-

tain olein, stearin, palmatin, butyrin and coloring matter. The first three elements olein, stearin and palmatin, are the principal components, are exactly the same in oleomargarine and butter, and constitute more than 90 per cent. of the finished product in both cases. The amount of butyrin varies slightly, being about six per cent. in good butter, and somewhat less in oleomargarine, depending upon the amount of milk, cream or butter used in its manufacture, as butyrin is found only in milk, cream or butter. The amount of coloring matter in butter varies at different periods and according to the condition and food of the cows. It is universally colored throughout the year to a uniform shade of yellow, but requires more color in the winter, when it is white, than in the spring, when it has some natural color, especially if the cows have been fed on green grass or clover. There is nothing, however, in these slight differences which renders butter more wholesome or digestible than oleomargarine as an article of food, and the coloring matter used in both cases is harmless. Yellow oleomargarine and yellow butter are used for the same identical purpose, and compete with each other in the market. The reason for coloring these products is the same in both cases: because the consumers demand it. A necessary element of the marketability of each is a certain shade of yellow which must be imparted to the product before it can be sold. There is no market either for uncolored oleomargarine or uncolored butter, except, in the case of oleomargarine, as a substitute for lard, and, in the case of butter, a small quantity of sweet unsalted butter is sold to supply the Jewish settlements. It costs less to produce

oleomargarine than it does to produce butter, and to this extent, oleomargarine successfully competes with and tends to cheapen butter; but this difference in cost is not great enough to enable the colored oleomargarine to be sold after paying the tax of ten cents per pound except occasionally when the price of butter is abnormally high (*Cliff* record, pp. 8–21; *Schick* record, pp. 8–19; *Broadwell* record, pp. 8–19).

Prior to July 1, 1902, when the act of May 9, 1902, went into effect, the business of producing and selling yellow oleomargarine had been able to compete with the yellow butter industry to a very considerable extent. It was shown that the Moxley plant, at which the packages involved in these cases were manufactured, had been in operation since 1884, supplying the trade in various parts of the United States with yellow oleomargarine designed to be used as a substitute for butter, and had grown to a capacity of between three and four million pounds per month. Prior to July 1, 1902, the entire output of this factory was all artificially colored as butter is colored. Thereafter, it could not be manufactured and sold at a profit after paying the tax of ten cents per pound, and for the first five months none of the colored article was produced or sold. In December, 1902, owing to the abnormally high price of butter, the Moxley Company was enabled to sell 37,594 pounds of colored oleomargarine, as compared with an output of about 2,000,000 pounds per month prior to July 1; but when butter fell again to its normal price, oleomargarine bearing the tax of ten cents per pound was practically unable to compete with it. The uncolored product, so far as could be ascertained, was sold for cook-

ing purposes, but only in comparatively small and uncertain quantities, because the relative cost of production was such that oleomargarine could not ordinarily compete with lard, although more desirable than lard for cooking purposes (*Cliff* record, pp. 18–20). Amundsen, a retail dealer in Chicago, who obtained his supplies from this factory, had worked up a business among the laboring classes of Chicago amounting to sales of 2,600 pounds per week. The customers "knew that it was oleomargarine and not butter and they bought it because it was cheaper than butter" (*ib.* p. 17). But when the ten cent tax was to be paid it was cheaper to buy butter, and they would not have the uncolored article. As a consequence, to quote the witness, "every customer I had quit" (*ib.*). Thereafter, he supplied a part of the trade with butter for table use, selling white oleomargarine only for cooking purposes (*ib.* pp. 16–17). Izard, a restaurant proprietor in Chicago, furnished yellow oleomargarine almost exclusively to his patrons, who had no objection to it so long as it had the proper color. After July 1, 1902, he could not use it because it was white and the addition of ten cents per pound to the price of colored oleomargarine resulted in the use by him of colored butter almost exclusively. The uncolored oleomargarine he could use only for cooking in place of lard (*ib.* pp. 17–18).

In the *Cliff* and *McCray* cases, where the package was tax-paid at the rate of one-fourth of one cent per pound, there was an additional question as to whether the package contained 'artificial' coloration within the meaning of section 8 of the act by reason of

the admixture of palm oil or colored butter. Upon this issue also the facts were undisputed. In the *Cliff* case, the government showed that the article was of the color of June butter, and that this color was imparted to it by the admixture of palm oil in its manufacture (*Cliff* record, p. 8). The defendant showed by competent testimony that palm oil is a vegetable oil derived from the fruit of a certain kind of palm which grows in East Africa, that it is a digestible and edible oil, containing all the chemical constituents of butter, except butyrin, that it is used by the natives of the country where it is produced as an article of food, that it is reddish-yellow in appearance and a very small proportion of it is sufficient to produce what is considered a desirable color in oleomargarine, that there is little, if any, difference between the taste of oleomargarine made in this way and the taste of butter, that it is quite as digestible as butter and is very cheap, that the oleomargarine thus produced is substantially the same product as good butter, and that the nature of palm oil is such that, by the process of refining, its intense color may be partially eliminated, thus rendering its use in considerable quantities desirable in the manufacture of oleomargarine apart from its yellow color (*ib.* pp. 10–13). These facts being wholly undisputed, the conviction was based on the assumption that the question thus presented had been foreclosed by the final decision of the Commissioner of Internal Revenue, who had ruled that palm oil in oleomargarine does constitute 'artificial' coloration (*ib.* pp. 9, 10), and had instructed the prosecuting witness, a Deputy Collector of Internal Revenue,

that its use would subject the product to the tax of ten cents per pound (*ib.* p. 8).

In the *McCray* case the government alleged in its complaint that the defendant had purchased for sale as a retail dealer a package of oleomargarine containing "coloring matter that caused it to look like butter of a certain shade of yellow," and bearing a tax-paid stamp at the rate of only one-fourth of one cent per pound (*McCray* record, p. 2). These allegations were admitted by the defendant, who averred by way of defense that the coloring matter contained in the article was that contained in the creamery butter used by the manufacturer of the oleomargarine as one of its elementary and necessary ingredients, according to a formula used in the course of business, which creamery butter contained Wells-Richardson's improved butter color, a harmless substance, universally used in the United States in the manufacture of butter, for the purpose of imparting a deep yellow color, that said creamery butter was purchased in the open market for said purpose, that no additional or other coloring matter of any kind whatsoever was used or introduced into said oleomargarine, that said oleomargarine contained nothing but oleo oil, neutral lard, creamery butter, milk, cream and common salt, and was wholesome and nutritious and free from any deleterious or injurious ingredient; that said package had been "packed, marked, stamped, branded and labeled, in compliance with all the provisions of said acts and with all the regulations thereunder prescribed by the Commissioner of Internal Revenue and the Secretary of the Treasury," that "the cost of manufacture of the wholesome and

nutritious oleomargarine like that contained in said package is such that it cannot be sold in competition with butter if the tax of ten cents per pound be imposed and paid," and that there is little demand in the United States for either uncolored butter or uncolored oleomargarine (*ib.* pp. 3–5). These facts were admitted by the demurrer of the government which the court sustained (*ib.* pp. 6, 7).

The historical facts concerning oleomargarine will be found in Encyc. Brit., vol. 17, p. 760; Century Dict. & Cyc., vol. 5, p. 4101; Oleomargarine Regulations, U. S. Int. Rev., June, 1902, pp. 11–15; "The Oleomargarine Bill" (Gov. Print., 1901), *resumé* pp. 815–885; *People* v. *Marx*, 99 N. Y. 377, 382–383; *People* v. *Arensberg*, 105 N. Y. 123, 129–132; *People ex rel. Moxley* v. *Pease*, 30 Chicago Leg. News, No. 34; *Ex parte Scott*, 66 Fed. Rep. 45, 48; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 8–12; *In re Brundage*, 96 Fed. Rep. 963, 965.

Shortly after the Franco-Prussian war of 1870–1871, the French government decided that it was of the utmost importance that some cheap and wholesome substitute for butter should be discovered for the relief of the poor in the great cities and manufacturing centers who were unable to obtain butter. To that end a prize was offered to scientists, and the result was the invention of oleomargarine by M. Mege-Mouries (Encyc. Brit., Vol. 17, p. 760). This invention was immediately recognized and hailed as a boon to humanity, and soon sprang into use all over the world. It was at first made by treating pure beef fat by a certain process. Afterwards, in order to make the product more wholesome and

digestible as well as more palatable, various modifications in the process were from time to time introduced. The present method is to take selected fat of the steer, reduce it to oil, which is called 'oleo oil,' and then mix and work this oleo oil with natural lard, milk, cream and butter. Oleomargarine furnishes a very valuable by-product of the slaughter houses and packing establishments, and the effect has been to utilize what had before gone to waste, to increase the value of beef cattle and to decrease the price of butter. It has practically no commercial use or value, except as a cheap and wholesome substitute for butter and as such it necessarily competes with butter. If it is not allowed to be used as a substitute for or to compete with butter, the discovery is of no practical utility to mankind.

The commercial character of oleomargarine is described by Mr. Justice Peckham in the case of *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 8–12. The growth and extent of the use of oleomargarine in every civilized country is part of the common history of the times. The official records of the United States government show that the output during the twelve months ending June 30, 1900, amounted to 107,045,028 pounds, an average of 8,920,419 pounds per month, and that the revenue collections from oleomargarine in 1900 were $2,543,785.[1] On the other hand, the same records show the yearly sales of butter to have been 1,492,699,143 pounds;[2] so that the production of oleomargarine was only about seven per cent. of the amount of butter manufactured. As oleomargarine was invented and is

[1] Senate Doc. 168, 57th Cong., 1st session.

[2] Twelfth Census, 1900, vol. IX, Manufactures, pt. III, p. 517.

used commercially almost wholly as a substitute for butter and in competition with butter, it is desirable that its flavor and color should be similar to the flavor and color of butter, and hence the necessity for the use of flavoring and coloring matter, being the same as that used to color and flavor butter. Oleomargarine is colored yellow for exactly the same reason that butter is colored, namely, to meet the taste and demand of the public.

In 1886 Congress determined to tax oleomargarine and regulate its manufacture. The act of August 2, 1886, contained a definition of oleomargarine and of butter which recognized the use of coloring matter as an element in the manufacture of both articles. It treated all oleomargarine, no matter how colored, as one article for the purposes of taxation. The tax then imposed was at the rate of two cents per pound, and between November 1, 1886, and the close of the year 1901 more than $21,000,000 had been paid as taxes under this law. The act of Congress of May 9, 1902, does not change these definitions, but oleomargarine is classified according to color, and that "free from artificial coloration that causes it to look like butter of any shade of yellow" is taxed at one-fourth of one cent per pound, while that containing "artificial coloration that causes it to look like butter of any shade of yellow," is taxed at ten cents per pound, or *forty* times as much.

The discussion in this brief will proceed upon the face of the act of Congress in question and its undisputed practical operation and effect, which is to prohibit the sale of yellow oleomargarine. No quotations will

be made from the debates in which the real purpose of the enactment may have been declared by individual members, because counsel are apprehensive that such debates are not admissible. *Knowlton* v. *Moore*, 178 U. S. 41, 72. Under the decisions, the question is most perplexing. The court frequently does refer to these debates for information, and yet has often declared that they are not admissible to show purpose or motive or to determine the intention of particular legislation. The true rule appears to be that debates may be referred to in order to show the occasion for the legislation and the circumstances surrounding its enactment, but not in order to ascertain the individual motives or purposes of its promoters or to control the meaning of the language used. As, in the present cases, reference to the debates would involve a showing of individual motives and purposes calculated, as it might be charged, to excite prejudice and sympathy, which counsel are not satisfied constitute proper elements in the strictly legal judgment which the court is required to render, they will not be referred to in argument. It is enough to say that the supposed "exigencies which led to the passage of the act" and "the reasons for fixing the duty at this amount" may be ascertained by examining the debates.[1] If the court shall reach the conclusion that it will consult these evidences of legislative intent and purpose, the references in the margin may be of convenience.[2]

[1] *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474; *Aldridge* v. *Williams*, 3 How. 9, 24; *Jennison* v. *Kirk*, 98 U. S. 453, 459; *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48, 64. See also *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463; *The Delaware*, 161 U. S. 459, 472; *Dunlap* v. *United States*, 173 U. S. 65, 75. *United States* v. *Freight Association*, 166 U. S. 290, 318, 360.

[2] Congressional Record, 57th Cong., 1st sess., vol. 35, part 2, pp. 1251 *et seq.*, 1299, 1310, 1544; part 3, pp. 3192, 3195, 3196, 3246, 3270–3274, 3280, 3322, 3452, 3458, 3466, 3467, 3499-3514, 3556, 3595-3597.

ASSIGNMENT OF ERRORS.

Error in refusing to hold that the provisions of the act of Congress of August 2, 1886, as amended by the act of Congress of May 9, 1902, were in contravention of the Constitution of the United States and the amendments thereto, in that—

(1) They constitute an encroachment upon and interference with the powers reserved to the several States;

(2) They deprive the plaintiffs in error of liberty and property without due process of law;

(3) They invest an administrative officer with the power finally to determine essentially judicial questions.

Error in striking out and refusing to consider proper evidence offered and received on behalf of the defendants below in the first three cases, tending to prove:

(1) That oleomargarine is a substitute for and competes with butter, that the market demand for and commercial value of both butter and oleomargarine require that they shall have a certain shade of yellow during all seasons of the year, and that there is practically no market either for uncolored butter or uncolored oleomargarine;

(2) That the cost of production of oleomargarine is such that, after payment of a tax of ten cents per pound thereon, it cannot be sold.

The questions presented under these assignments of error may be classified for the purposes of argument under the following heads, viz.:

I. The power of Congress to levy excise taxes on manufactures (pp. 19–28).

II. The internal commerce of the States and the exercise of the taxing power by Congress (pp. 28–52).

III. The restrictions upon the taxing power contained in the Fifth Amendment (pp. 52–70).

IV. The provision of section 14 of the act conferring judicial power upon the Commissioner of Internal Revenue (pp. 70–75).

V. Effect of the invalid amendment upon the original act (pp. 75–76).

I.

THE POWER OF CONGRESS TO LEVY EXCISE TAXES ON MANUFACTURES.

The Constitution of the United States grants to Congress (Art. I, sec. 8) "the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States," and directs that capitation and other direct taxes shall be laid in proportion to the census or enumeration, and that duties, imposts and excises shall be uniform throughout the United States. Subject to these two directions, which are not strictly limitations of power but rules prescribing the mode in which the power shall be exercised,[1] the only express limitation in the Constitution, as originally adopted, was that no "tax or duty shall be laid on articles exported from any State."[2]

An examination of the debates in the various conventions to which the Constitution was submitted for ratification and of the writings of that time will show that the subject of federal taxation and the danger of oppression from its exercise was discussed as much as any other fea-

[1] Chief Justice Chase in *Veazie Bank* v. *Fenno*, 8 Wall. 533, at p. 541.
[2] Art. I, sec. 9; *Fairbank* v. *United States*, 181 U. S. 283, 290.

ture, and that some of the States apprehended particular injury from the power to levy excises on manufactures and commodities. It was particularly objected by the opponents of the Constitution that Congress was given power to pass any law which it thought necessary and proper in aid of the powers granted to it. The answer of Hamilton in the *Federalist* was that Congress could not by its mere declaration make that necessary and proper to the execution of its powers which, in its essence, was not necessary and proper. His language was (Ford's ed. No. 78, p. 521):

> "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is a proper and a peculiar province of the courts. The Constitution is, in fact, and must be regarded by the judges, as the fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute; the intention of the people to the intention of their agents."

Notwithstanding this assurance, destined as it was to become an elemental feature of our constitutional jurisprudence,[1] it is well known that the consent of the people in the necessary number of States was secured only upon the pledge that amendments recognizing the reserved powers of the States and protecting the individual against the abuse of the powers granted to the national government would be forthwith submitted. *Barron* v. *The Mayor and City Council of Baltimore*, 7 Pet. 243, 250. In pursuance of this pledge, the first Congress (1 Stat. 97; Rev. Stat. p. 28, note) proposed the first ten articles of amendment to the Constitution, "in order," as recited in the preamble of the resolution, "to prevent misconstruction or abuse of its powers" and for the purpose of adding "declaratory and restrictive clauses." Of these restrictive clauses, the Fifth Article provides that "no person shall . . . be deprived of life, liberty or property, without due process of law," and the Tenth Article provides that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." These amendments are clearly to be regarded of equal force and validity with the provisions of the Constitution itself. As Mr. Justice Shiras, speaking for the court in the recent case of *Prout* v. *Starr*, 188 U.S. 537, 543, 544, said:

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. . . .

[1] *Marbury* v. *Madison*, 1 Cranch, 137, 176-179; *McCulloch* v. *State of Maryland*, 4 Wheaton, 316, 421, 423; *Hepburn* v. *Griswold*, 8 Wall. 603, 614, 615; *Smyth* v. *Ames*, 169 U. S. 466, 527; *Matter of Application of Jacobs*, 98 N. Y. 98, 112.

> It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed."

But whether the Fifth and Tenth Amendments constitute limitations upon the taxing power of Congress has never yet been expressly adjudged. The wise rule of our system of jurisprudence which confines adjudications by the courts to actual cases as they arise from time to time, has made the growth of American constitutional law extremely slow, and novel exercises of governmental power are constantly presented which require a renewed exposition of fundamental principles and a re-examination of the distribution of governmental powers contained in the Constitution.[1] For centuries, the principles of the common law have been growing by slow steps to maturity and symmetry, evolving rules of private justice as between man and man, and it is, therefore, hardly astonishing that the growth of constitutional jurisprudence also should be by slow and cautious steps in the application to individual cases of the eternal principles of public justice embodied in the Constitution which protect personal liberty and property against the abuse of the powers of government. Although the Constitution has been in operation for one hundred and fourteen years, this court has not yet adjudged whether there are any qualifications of the power of Congress to levy taxes other than the rules of apportionment and geographical uniformity, except in so far as the instrumentalities of the state governments are concerned.[2] Indeed, it was not until

[1] *Lelaigh* v. *Port of Mobile*, 127 U. S. 640, 648.

[2] *The Collector* v. *Day*, 11 Wall. 113, 124; *United States* v. *Railroad Company*, 17 Wall. 322, 327; *Van Brocklin* v. *State of Tennessee*, 117

May, 1900, in the case of *Knowlton* v. *Moore*, 178 U. S. 41, 92, that the true meaning of the provision "uniform throughout the United States" was definitely settled to be geographical uniformity.[1] In the later case of *Wight* v. *Davidson*, 181 U. S. 371, 377, Mr. Justice Shiras stated in the opinion of the court, referring to a federal statute, that "the constitutional right against unjust taxation is given for the protection of private property," but did not discuss what provision of the Constitution secured that right.[2] And still later, in the case of *Patton* v. *Brady*, 184 U. S. 608, 622, we find Mr. Justice Brewer stating that the rule of geographical uniformity was the only limitation imposed upon Congress by the framers of the Constitution and the people who adopted it in respect of the power to lay excise taxes. Yet, it cannot be supposed that this language was intended to recognize the existence of an unrestrained taxing power, in view of the dissent of the learned Justice in *Knowlton* v. *Moore*, 178 U. S. 41, 110.

From the statement of facts, it appears that the inquiry in each of the cases at bar is confined to the validity of the act of Congress of May 9, 1902, in so far as it operates upon the internal commerce of the States of Illinois and Ohio. The oleomargarine in question was manufactured and sold in Illinois and Ohio by residents of those States and the transaction was confined to

U. S. 151, 178; *Mercantile Bank* v. *New York*, 121 U. S. 138, 162; *Income Tax Cases*, 157 U. S. 429, 584; *Plummer* v. *Coler*, 178 U. S. 115, 117; *Ambrosini* v. *United States*, 187 U. S. 1, 7; *Snyder* v. *Bettman*, 190 U. S. 249, 253.

[1] See, however, Mr. Justice Field's discussion of the provision in *Income Tax Cases*, 157 U. S. 429, at p. 592 *et seq.*

[2] See also *Parsons* v. *District of Columbia*, 170 U. S. 45, 51.

the internal commerce of each State. It is, of course, settled that Congress was not delegated any power whatever to regulate the internal commerce of the States, and that the regulation of such commerce was expressly reserved to the States by the Tenth Amendment. *Gibbons* v. *Ogden*, 9 Wheat. 1, 194, 203; *License Cases*, 5 How. 504, 574, 599; *Passenger Cases*, 7 How. 283, 400; *License Tax Cases*, 5 Wall. 462, 470–471; *United States* v. *Dewitt*, 9 Wall. 41, 44; *Trade-Mark Cases*, 100 U. S. 82, 96–97; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 13. That the police power never was surrendered by the States is also a proposition that need not be argued. It is "conceded in all the cases." *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661; see also *In re Rahrer*, 140 U. S. 545, 554, 556; *Plumley* v. *Massachusetts*, 155 U. S. 461, 472; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 11, 13; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558. And the act now before the court, if grounded upon the attempt to regulate the manufacture of dairy products and oleomargarine and their sale in the internal commerce of the States, would be clearly beyond the powers of Congress and unconstitutional. *United States* v. *Dewitt*, 9 Wall. 41, 45; *United States* v. *Fox*, 94 U. S. 315, 320; *Trade-Mark Cases*, 100 U. S. 82, 96; *Covington, &c., Bridge Co.* v. *Kentucky*, 154 U. S. 204, 210; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 13; *United States* v. *Boyer*, 85 Fed. Rep. 424, 432.

The provisions of this act, so far as they affect the internal commerce of a State, can, therefore, only be sustained under the power of Congress to tax and to employ necessary and proper means for carrying that

power into execution. It follows that the exact question presented in the cases at bar is whether Congress may prohibit the internal manufactures of the States by means of a prohibitive tax.

The power of Congress to exclude any commodity from interstate commerce or to lay a prohibitive excise tax upon articles transported between States in order indirectly to accomplish that end, need not now be discussed. It will be time enough to consider the subject when a case actually involving that momentous question shall arise, for it would be difficult to suggest one of a graver character or the decision of which would be more far-reaching. Nevertheless, we may remark, in the language of Mr. Justice Harlan, delivering the opinion of the court in the recent *Lottery Case*, 188 U. S. at pp. 362–363:

> "The power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several States."

Nor, as to foreign commerce, is there any need to challenge or doubt the unlimited power of Congress to exclude or prohibit, and, as a means to that end, to lay prohibitive duties. Its authority to do so does not rest upon the taxing power, for even if the national government had no power to tax, its power

to regulate foreign commerce and international relations would be broad enough to support prohibitory duties on imports. No one has ever doubted that a governmental power to regulate international trade included the power to tax it as a means of regulation. The American colonies did not deny the authority of the British Parliament to tax them *as a regulation of commerce.* The War of the Revolution was precipitated because Parliament sought to use this power for another object, namely, the raising of revenue as such.[1]

It may, therefore, be conceded that Congress, under the plenary power to regulate our relations with foreign countries, can exclude commodities of any nature whatsoever, and levy prohibitive taxes or protective duties to accomplish that object. The power of Congress—the legislative power of a sovereign nation—to exclude foreign persons or commodities in its judgment and discretion need not be challenged in the slightest degree. But no one would seriously suggest that any class of American citizens could be excluded or deported under the same power which enables Congress to exclude or deport aliens. *United States* v. *Wong Kim Ark*, 169 U. S. 649, 653. When we say that Congress may exclude or deport foreigners or their products or publications from the United States, or pass a non-intercourse law, or place an embargo upon foreign ships or manufactures, we are but recognizing the ancient doctrine of international law that an alien and an alien's property come into the territory of a sovereign nation only by its sufferance, and may be

[1] *Gibbons* v. *Ogden*, 9 Wheat. 1, 199, 202.

excluded at its will.[1] And whether the exclusion be for the purpose of self-defense, or as an incident to the regulation of imports or commerce, or otherwise, the right to exclude or deport or prohibit is as much the sovereign's prerogative as the power to make treaties giving to foreigners the privilege of abiding or of bringing or selling their goods or publications within the sovereign's domain. That this attribute of sovereignty has been surrendered by and does not belong to the States cannot for a moment be doubted, for the States are expressly forbidden to enter into any form of treaty.[2]

In Cooley on Taxation, the distinguished author well says (at pp. 11, 12, 13):

> "In the laying of taxes, one purpose had in view may be to encourage one branch of industry or trade, though at the expense of others; as where a tax is laid upon certain fabrics received from abroad by the exchanges of commerce for the sake of encouraging the domestic producer of similar articles, on whose industry the tax operates as a bounty. Such a burden, however, may be so heavy that the market will not warrant its being paid, and in such case, instead of producing revenue, it merely precludes importation. But a law which, under the name of taxation, has for its purpose only to embarrass and, perhaps, to destroy a certain branch of commerce, if enacted by a State, would look to the general police power for its justification; and, if enacted by the general government, would seem more properly to derive its force from the authority conferred upon the government to regulate commerce,

[1] *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707, 712; *United States* v. *Brigantine "William,"* 2 Hall's Am. Law Journal, 255; *Gibbons* v. *Ogden*, 9 Wheaton, 1, 191, 192.

[2] Section 10 of Article I of the Constitution of the United States.

and the intercourse with foreign countries, than to an authority conferred for revenue purposes, which such a law would not aim or tend to subserve. . . . As no one will pay the tax who does not expect to be reimbursed the expense from the profits of sales, it is obvious that the heavier the tax the fewer can afford to pay it, and it may be made so heavy that no one can afford to pay it, and then it becomes prohibitory. A tax laid for the double purpose of regulation and revenue must be grounded in both the police and the taxing power; *but the grant of a power to tax would not authorize the imposition of a burden in its nature and purpose prohibitory.*"

II.

THE INTERNAL COMMERCE OF THE STATES AND THE EXERCISE OF THE TAXING POWER BY CONGRESS.

In the cases at bar, the court is called upon to consider what purports on its face to be a tax law, but which, it is contended, constitutes the imposition of a burden in its nature and purpose prohibitory of the internal commerce of the States in a recognized article of commerce.[1]

There can be no reasonable doubt that any statute of Congress which purported on its face to prohibit internal commerce in oleomargarine would be declared by this court to be unconstitutional and void on the ground that it sought to accomplish an object not entrusted to Congress and invaded the powers reserved to the States.[2] It is now to be determined whether Congress may nevertheless accomplish this forbidden object and thereby under the form of a tax law, do indirectly what it could not do directly.

[1] *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 8.
[2] *United States* v. *Dewitt*, 9 Wall. 41, 43–45; *Trade-Mark Cases*, 100 U. S. 82, 96; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 11–13.

If the object of the act be legitimate taxation, the excise in question is concededly within the constitutional powers of Congress; but if, under the pretext of laying an excise on manufactures, the object sought to be accomplished is to prohibit or destroy the manufactures and internal commerce of the States, then it is submitted that the legislation is not legitimate taxation at all and is beyond the authority delegated to Congress and conflicts with the powers expressly reserved to the States.

Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, 423, among other things said:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. . . . Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

The settled doctrine of this court is that whatever may be the motive or pretext or guise of a statute, or in whatever language it may have been framed, its purpose and its validity must be determined by its natural and reasonable effect to be ascertained from the practical operation of its provisions.

Thus, in *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268, Mr. Justice Miller, delivering the unanimous opinion of the court, among other things, said:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger cases*. To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum."

Mr. Justice Miller in *Morgan* v. *Louisiana*, 118 U. S. 455, 462, again referred to this point in the following language:

> "In all cases of this kind it has been repeatedly held that, when the question is raised whether the State statute is a just exercise of State power or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose. See *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Cannon* v. *New Orleans*, 20 Wall. 577."

In construing a state statute applicable to oleomargarine, Mr. Justice Peckham in *Collins* v. *New Hampshire*, 171 U. S. 30, 33, 34, speaking for the court, said:

> "The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Morgan's Steamship Co.* v.

Louisiana, 118 U. S. 455, at 462. Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition."

Indeed, as Mr. Justice Harlan said, in *Mugler* v. *Kansas*, 123 U. S. 623, 661:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

And Mr. Justice Brewer in *Fairbank* v. *United States*, 181 U. S. 283, 294, 295, 300, speaking of the decision in *Woodruff* v. *Parham*, 8 Wall. 123, used the following language:

> "In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result. . . . The form in which the burden is imposed cannot vary the substance. . . . Constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation."

In *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 698, Mr. Chief Justice Fuller said, speaking of taxation:

> "The substance and not the shadow determines the validity of the exercise of the power."

And again in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 581:

> " If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution. . . . But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

In *Thomas* v. *Gay*, 169 U. S. 264, 283, Mr. Justice Shiras, speaking of the acts of a territorial legislature under authority of Congress, said :

> " When, as may sometimes happen, the legislature transcends its functions and enacts, in the guise of a tax law, a law whereby the property of the citizen is confiscated, or taken for private purposes, the judiciary has the right and duty to interpose."

Mr. Justice McKenna, in *Smith* v. *St. Louis and Southwestern Ry. Co.*, 181 U. S. 248, 257, said:

> "Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained."

It must, therefore, be presumed that the purpose which Congress had in view in the statute of 1902 was to accomplish that which follows as the natural and reasonable effect of its enactment, and that if the tax now in question operates as a prohibition of the manufacture and sale of an article of commerce, the legislation is an invasion of the powers reserved to the States, and seeks to accomplish an object beyond the powers granted to Congress.

It is not, of course, disputed that Congress for national purposes may tax the manufactures of a State whether constituting internal or interstate

commerce, and that both the national and state governments can lay excise taxes upon the same articles. Conflict may thus arise; and as commodities can only bear a certain amount of taxation, varying according to the nature of the article, the exercise of the taxing power by one government may indirectly affect the collection of taxes by the other. The mere fact that Congress taxed a given article, *e. g.*, liquors, would not, of course, limit or affect the power of the States either to tax or to prohibit its manufacture so far as concerned internal commerce; [1] and conversely the fact that a State taxed its manufactures would not limit or affect the power of Congress to tax the same commodities. In the case at bar, there is, however, no conflict of taxing powers, for neither the State of Illinois nor the State of Ohio taxes the manufacture of oleomargarine other than indirectly by means of general property taxes.

In its final analysis, then, the court is asked to determine the validity of the present law according to its natural and reasonable effect which "amounts in law to a prohibition"; in other words, to determine by its practical operation whether it is a tax law at all, or merely an attempt to prohibit internal commerce under the guise or pretext of a tax law. There is no rule of constitutional law and no consideration of public policy which will prevent this court from deciding according to substance and not to form, simply because a given enactment purports to be an exercise of the taxing power. The indisputable law of the Constitution is

[1] *License Tax Cases*, 5 Wall. 462, 470; *Pervear* v. *The Commonwealth*, 5 Wall. 475, 479.

that Congress may not interfere with or regulate the internal commerce or affairs of a State, and the court will enforce that rule according to its letter and its spirit. The Tenth Amendment imperatively forbids any such interfering regulation as much as if the Constitution declared in so many words that Congress should not interfere with internal commerce. It surely cannot be maintained as a rule of our constitutional law that what Congress may not do directly it may nevertheless do indirectly under the pretext of an exercise of the taxing power. As Mr. Chief Justice Fuller said in the *Income Tax cases, supra* (157 U. S. 429, 581):

> "It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

But, it will be said, the concession of the power to tax brings the case within the rule that the extent of the exercise of the taxing power cannot be controlled by the courts. This argument, however, begs the whole question. The point to be decided is whether or not this is a tax law or a regulation of the internal commerce of the States. If it be a legitimate tax law, it is constitutional. If the nominal exercise of the taxing power be a mere pretext "for the accomplishment of objects not entrusted to the government," then it is not constitutional, and it is the province of this court to so declare. It may be often difficult to draw a line between a tax law and an attempt to regulate or prohibit under the guise or pretext of a tax; but yet it is not always impracticable, for the validity of many enactments, state and national, may depend upon degree. The amount of a tax or license fee or regulation of rates

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frequently forms the basis of judicial action and determines the validity of legislation. The court has found no insuperable difficulty in determining the difference between a tax and a reasonable fee covering expenses to protect the government against fraud,[1] between a tax on exports and a mere stamp duty on a document,[2] between a tax and a penalty,[3] between a tax and a covert regulation of interstate commerce,[4] between a legitimate regulation of rates and a regulation which is confiscatory.[5] The amount of the tax imposed in a given case has often been considered by this court in determining whether a particular statute was valid as a means to accomplish a constitutional object, or invalid as a pretext to accomplish an object forbidden by the Constitution. The instance of a license tax upon persons or corporations engaged in foreign or interstate commerce is a common one. In such a case, the only object which may constitutionally be accomplished by a State is compensation for reasonable governmental inspection or supervision. If the amount of the tax be materially in excess of what is necessary for that object, there is an indication of a purpose to regulate foreign or interstate commerce; and it is therefore necessary for the court to draw the line in each case according to the amount and adjudge what amount will constitute taxation for a proper purpose and what amount will constitute a regulation of commerce. *Atlantic, etc., Tel. Co.* v. *Philadelphia*,

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[1] *Pace* v. *Burgess, Collector*, 92 U. S. 372, 374, 375.
[2] *Fairbank* v. *United States*, 181 U. S. 283, 290.
[3] *Helwig* v. *United States*, 188 U. S. 605, 611.
[4] *Atlantic, etc., Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 162.
[5] *Smyth* v. *Ames*, 169 U. S. 466, 527.

190 U. S. 160, 164. While a State may impose a license fee upon foreign corporations engaged in interstate commerce and indirectly tax their franchises,[1] it cannot for a moment be doubted that, if the State should impose a prohibitory tax, it would be unconstitutional and that the question of constitutionality in such a case would depend entirely upon degree. If, for example, a State should impose a property tax upon an express company,[2] the effect of which was practical prohibition, no doubt the court would hold that it was not a legitimate tax at all, but a roundabout way of prohibiting indirectly what the State could not prohibit directly, namely, interstate commerce. So, whenever it is claimed that the amount of a state inspection charge upon articles of foreign or interstate commerce is so much in excess of what is reasonably necessary to accomplish that object as to evince a purpose to interfere by taxation with foreign or interstate commerce, the court must decide when the amount in the particular case becomes unconstitutional. *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345, 351 *et seq.*, citing cases. The same principle applies in those cases where the amount of compensation for the use of property affected by a public interest is drawn in question as being confiscation in the guise of police regulation. *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S.

[1] *Maine* v. *Grand Trunk R'y Co.*, 142 U. S. 217, 228; *Ficklen* v. *Shelby County*, 145 U. S. 1, 23; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697; *Atlantic, etc., Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 163, citing cases.

[2] *Adams Express Company* v. *Ohio*, 165 U. S. 194, 220; *Adams Express Company* v. *Kentucky*, 166 U. S. 171, 180: *Adams Express Company* v. *Ohio*, 166 U. S. 185, 221.

238, 250, and *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 85, citing cases.

At the last term, in *Helwig* v. *United States*, 188 U. S. 605, 611, Mr. Justice Peckham said:

> "Whether called a 'further sum' or an 'additional duty,' or by some other name, the amount imposed was so large in proportion to the value of the merchandise imported as to show beyond doubt that it was a sum imposed not in fact, as a duty upon an imported article, but as a penalty and nothing else."

So, with regard to the tax in question, the amount of the tax is so large in proportion to the value of the merchandise as to show beyond doubt that it was a sum imposed, not in fact as an excise for revenue, but as a prohibition, and nothing else.

Let us take, for the purpose of concrete illustration, the case of oleomargarine. It has been held that a State, under the power to regulate its internal commerce, could prohibit the manufacture and sale of oleomargarine (*Powell* v. *Pennsylvania*, 127 U. S. 678, 686; *Plumley* v. *Massachusetts*, 155 U. S. 461, 467, and *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 246), but that it could not prohibit the sale of oleomargarine manufactured in other States and offered for sale in the course of interstate commerce. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 21, 25. Is it conceivable that nevertheless, a State, could indirectly do what this court has said it could not directly do, that is, practically prohibit interstate commerce in oleomargarine by taxing it to death? Surely this court would not entertain an argument attempting to uphold such legislation upon the ground that on

its face it was impartial and applied alike to internal and interstate commerce and that the power to tax involved the power to destroy.[1]

If a State should impose a tax upon a commercial commodity as *property*[2] and the effect of such a tax, as to articles brought from other States, was to destroy all opportunity to sell the commodity, it cannot be doubted that the law would be declared unconstitutional as interfering with interstate commerce even though the same amount of tax should be laid on domestic manufactures as property, and even though such a tax would only apply after the 'original package' of importation had been broken and the contents exposed for sale.[3] There would be *prima facie* no discrimination in the law; on its face it would apply impartially to home and foreign manufactures alike. Nevertheless, such a tax law would be held unconstitutional; for, if allowed to operate, it could as effectually bar the products and manufactures of other States as if the law directly enacted that such articles should not be sold.[4] The products of one or more States could thus, by taxation, be excluded from any State. Fortunately, "such efforts have been heretofore rendered fruitless by the supervis-

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[1] *Woodruff* v. *Parham*, 8 Wall. 123, 131, 140; *Brown* v. *Houston*, 114 U. S. 622, 634. Of course, where the State may prohibit as a police regulation, different considerations are presented, as discussed by Judge Cooley in the quotation from his work on Taxation, *supra*, pp. 27, 28.

[2] *Woodruff* v. *Parham*, 8 Wall. 123, 131, 140; *Hinson* v. *Lott*, 8 Wall. 148, 152; *Brown* v. *Houston*, 114 U. S. 622, 632, 634; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70, 74; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445, 453.

[3] *May* v. *New Orleans*, 178 U. S. 496, 508.

[4] *Leloup* v. *Port of Mobile*, 127 U. S. 640, 647; *Brennan* v. *Titusville*, 153 U. S. 289, 303.

ing action of this court."[1] In the supposed case, it would undoubtedly be held that, in whatever language the statute was framed, its purpose must be determined by its natural and reasonable effect. The court would brush aside the form and the pretext, and hold that the tax in its practical effect was prohibitory, that the purpose of the legislation was legally to be determined by such prohibitory effect, and that prohibition was beyond the constitutional power of a State.[2]

In the case of such a property tax levied by a State, would it not be relevant to show that the amount of the tax was such as to prevent sales, and that consequently it was not strictly a tax law at all but a regulation of interstate commerce? It would undoubtedly be held that in whatever language the statute was framed, its purpose must be determined by its natural and reasonable effect.

On the other hand, if the tax was not prohibitive but a proportional and reasonable charge for the maintenance of the state government, levied upon all similar *property*, entirely different considerations would be presented, and it would then be for the courts to determine whether such a law was in its purpose, operation or effect a proper and reasonable tax law which did not unduly interfere with the power of Congress to regulate interstate commerce.[3] In such a case, too, would it not be relevant to show that the amount of the tax was such as not to operate as a practical prohibition of

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[1] *Caldwell* v. *North Carolina*, 187 U. S. 622, 633.

[2] *American Fert. Co.* v. *Board of Agriculture, No. Car.*, 43 Fed. Rep. 609, 613, cited in *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345, 347.

[3] *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697.

sales in competition with the products of the taxing State? Or, if it were in the guise of an inspection or license fee, would it not be relevant to show that it was not large enough to operate as a prohibition or penalty?[1]

Are not these all cases of degree and does not the extent and effect of the tax determine its constitutionality?

Nor does the fact that the act of Congress applies also to interstate commerce affect the question, for it is the settled law of this court that the power of Congress to regulate interstate commerce does not uphold any act which operates directly upon internal commerce and invades the domain of the States. The very point was involved in the *Trade-Mark Cases*, 100 U. S. 82, 95, 96, where, delivering the unanimous opinion of the court, Mr. Justice Miller said:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

The principal argument in support of the law has heretofore been based upon the famous phrase "that the power to tax involves the power to destroy," in

[1] *Ward* v. *Maryland*, 12 Wall. 418, 425, 429; *Welton* v. *State of Missouri*, 91 U. S. 275, 278; *People* v. *Compagnie Gen. Transatlantique*, 107 U. S. 59, 60; *Moran* v. *New Orleans*, 112 U. S. 69, 73; *Walling* v. *Michigan*, 116 U. S. 446, 461; *Emert* v. *Missouri*, 156 U. S. 296, 311.

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support of which is cited the decision of this court in *Veazie Bank* v. *Fenno*, 8 Wall. 533.

We know of no dictum in any decision that has been more misconstrued than the statement of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 431, that "the power to tax involves the power to destroy," nor of one whose misapplication is more illustrative of the dangers which lurk in a brilliant epigram. Since that decision, there has been no arbitrary or unjust exaction under the guise or pretext of taxation but that it is said to be sanctioned by this dictum. It has done immeasurable harm, for it has been held up before legislatures as placing in their hands unrestrained power to exercise tyranny in the form of law. "How oft the sight of means to do ill deeds makes ill deeds done."[1] The great Chief Justice never meant to say that the taxing power could be arbitrarily exercised to the extent to which his language has been perverted, or that it could be used as a pretext to accomplish a forbidden object. He would have repudiated such a proposition as monstrous and against all justice and reason. Far from meaning to say that the power of taxation could be used as a mere pretext for accomplishing objects not entrusted to the government, at page 423 of the same opinion, he distinctly pointed out that Congress could not do so. He never meant that under the power of taxation, either of the federal or the state governments, any class of persons or business could properly be selected for destruction. He was speaking of a discriminating state

[1] King John, IV, 2. See "The Oleomargarine Bill" (Gov. Print, 1901), p. 857.

tax imposed upon an instrumentality of the national government. He did not mean that, under the pretense of taxation, Congress could invade any State and destroy one of its industries solely for the purpose of benefitting another competing industry. He was speaking of a legitimate tax law. Had the occasion arisen in his time, who can doubt that he would have limited this now famous dictum to the facts of that case? *Cohens* v. *Virginia*, 6 Wheat. 264, 399. Doubtless he would have held that the Constitution will not admit of the exertion of any power of government, be it the taxing power or any other, which, in its last analysis, is appropriate and calculated only to interfere with the internal concerns of the States and to accomplish the destruction of private property and the deprivation of the right to pursue a useful calling without due process of law.

Even though it be true, in a proper sense, that the power to tax involves the power to destroy, it is no less true, by the reasoning of the opinion in *McCulloch* v. *Maryland* (at p. 423), that this power to destroy, in the hands of Congress, must not be exerted to accomplish objects not assigned to it by the Constitution. It must operate in harmony with the constitutional scheme. On the other hand, this same power to destroy in the hands of a State (which is the sense in which it was discussed by Marshall) is justifiable by the inherent power of government originally and always residing in the States, provided only it be not forbidden by the Constitution. In short, though the destruction of the oleomargarine industry by a repressive state tax might be supported under the police power by all those

familiar arguments which have been advanced in this court during the past sixteen years,[1] a similar repressive tax by Congress must be supported, if at all, on other grounds. Cooley on Taxation, p. 12, 13.

The suggestion in *McCulloch* v. *Maryland*, 4 Wheat. 316, 435, that Congress might tax a state instrumentality with more reason than a State could tax an instrumentality of the Nation, cannot be cited as sustaining an unlimited taxing power in Congress, inasmuch as it has long since been established that Congress has no power to tax the instrumentalities of a State (*Snyder* v. *Bettman*, 190 U. S. 249, 253), unless it be necessary and proper to carry into execution some power given to Congress other than the power of taxation.

In *Berney* v. *Tax Collector*, 2 Bailey (S. C.) 654, 674, Harper, J., said, in speaking of a state tax upon stock of the United States Bank, and after discussing Marshall's dictum that the power to tax involves the power to destroy:

> "It will be perceived, that in my opinion the question is, whether the imposition in question is, *in good faith*, *a tax*, or whether, under the guise of a tax, a *penalty* was intended to be inflicted, with a view to the suppression of the bank. Such a distinction was made in the case of *The State* v. *Allen*, 2 M'C. 55, where a tax, as it was called, of $10,000, was imposed on the act of selling lottery tickets. And this court held, that, although called a tax, it was in fact a penalty, having no reference to property; and that it violated the provision of our constitution, that 'no freeman of this State shall be taken, or imprisoned, or disseized of his

[1] *Powell* v. *Pennsylvania*, 127 U. S. 678; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238.

freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land.'

I am aware, that it has been objected to this method of construction, that it is liable to too great uncertainty, and gives to the courts a dangerous latitude of construction, in determining on the *intention* of the legislature. When will you say that the law becomes unconstitutional? When the tax is raised to five, or ten, or fifty per cent.? By what rule shall government be conducted? Or when can the legislature be assured that its laws will have effect? In general, perhaps, it is desirable, that rules of law should be technical and artificial; being thus susceptible of greater precision: but this is not always practicable, and I fear that we may sometimes run into the most dangerous errors, in searching after this precise, technical, artificial rule. In such a case as this, it is not possible to have one, unless, by adopting such artificial reasoning as I have referred to in the beginning, we pervert the constitution to purposes, for which it, most notoriously, was never intended, and change the whole character of our institutions."

The *Veazie Bank* case is not authority for an unlimited and arbitrary power to tax. On the contrary Chief Justice Chase said (p. 541) that—

> "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, *or if exercised for ends inconsistent with the limited grants of power in the Constitution.*"

The tax in that case was sustained upon the ground that Congress, in the exercise of undisputed authority to regulate the currency, could adopt any means suitable for that purpose, and that a prohibitive tax con-

stituted an appropriate means.[1] If the statute had declared on its face that it was intended to prohibit issues of currency by state banks, the act would have been constitutional. The *end* was legitimate and prohibitory *means* were appropriate. If there had been no power in Congress to regulate the currency, it cannot be doubted that the tax then imposed would have been regarded as seeking to accomplish an object not entrusted to Congress and "exercised for ends inconsistent with the limited grants of power" to the federal government and the powers expressly reserved to the States.

That the *Veazie Bank* decision does not rest upon the proposition that the power to tax involves the power to destroy the currency of state banks has been repeatedly recognized by this court.

Thus, at the same term, Mr. Justice Miller, who concurred in the opinion of the court in the *Veazie Bank* case, said in his dissenting opinion in *Hepburn* v. *Griswold*, 8 Wall. 603, 636:

> "In the *Veazie Bank* v. *Fenno*, decided at the present term, this court held, after full consideration, that it was the privilege of Congress to furnish to the country the currency to be used by it in the transaction of business, whether this was done by means of coin, of the notes of the United States, or of banks created by Congress. And that as a means of making this power of Congress efficient, that body could make this currency exclusive by taxing out of existence any currency authorized by the States."

The precise question decided in the *Veazie Bank* case arose again ten years later in *National Bank* v. *United*

[1] See, however, the language used at p. 548.

States, 101 U. S. 1, and the language employed in deciding it shows clearly the scope of the principle involved. Chief Justice Waite, delivering the opinion of the court, said (pp. 5, 6):

> "We think this case comes directly within the principles settled in *Veazie Bank* v. *Fenno*, (8 Wall. 533), where it was distinctly held that the tax imposed by that section on national and State banks for paying out the notes of individuals or State banks used for circulation was not unconstitutional. The reason is thus stated by Mr. Chief Justice Chase: 'Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. To this end Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.' . . . The tax thus laid is not on the obligation, but on its use in a particular way. As against the United States, a State municipality has no right to put its notes in circulation as money. It may execute its obligations, but cannot, against the will of Congress, make them money. The tax is on the notes paid out, that is, made use of as a circulating medium. Such a use is against the policy of the United States. Therefore the banker who helps to keep up the use by paying them out, that is, employing them as the equivalent of money in discharging his obligations, is taxed for what he does. *The taxation was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do.*"

The true scope of the principle of the *Veazie Bank* case is perhaps most clearly apparent from its application in the *Head Money Cases*, 112 U. S. 580, 596, decided in 1884. It is there held that an otherwise unconstitutional exercise of the taxing power may be upheld where the object accomplished is one committed to Congress by the Constitution; and the *Veazie Bank* case is relied on as the leading authority. Mr. Justice Miller, who delivered the opinion of the court, said:

> "If this is an expedient regulation of commerce by Congress, and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax. In the case of *Veazie Bank* v. *Fenno*, 8 Wall. 533, 549, the enormous tax of eight [ten] per cent. per annum on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created, namely, the legal-tender notes and the notes of the national banks. *It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple.* . . . We are clearly of opinion that, in the exercise of its power to regulate immigration, and in the very act of exercising that power, it was competent for Congress to impose this contribution on the ship owner engaged in that business."

The *ratio decidendi* of the cases upon this point is summed up by Mr. Justice Miller in *Loan Association* v. *Topeka*, 20 Wall. 655, 663, namely,—

> "Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited."

And the tax involved in that case was condemned because the object of the statute was found to be the

encouragement and benefit of certain private industries. To the same effect, see *Parkersburg* v. *Brown*, 106 U. S. 487, 500; *Cole* v. *LaGrange*, 113 U. S. 1, 6; *The State ex rel.* v. *Osawkee Township*, 14 Kan. 418, 427; *Lowell* v. *Boston*, 111 Mass. 454, 461; *Mead* v. *Acton*, 139 Mass. 341, 344; *Allen* v. *Inhabitants of Jay*, 60 Me. 124, 128, 138; *Sugar Co.* v. *Auditor General*, 124 Mich. 674, 678; *State* v. *Foley*, 30 Minn. 350, 357; *Weismer* v. *Village of Douglas*, 64 N. Y. 91, 100; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 515; *Sharpless* v. *Mayor of Philadelphia*, 21 Pa. St. 147, 168; Burroughs on Taxation, pp. 6, 506.

Answering the argument that the power to tax involves the power to destroy, Mr. Justice Harlan, delivering the dissenting opinion in *Fairbank* v. *United States*, 181 U. S. 283, 318, used the following language:

> "It is said that the power to tax is the power to destroy, and that if Congress can impose a stamp tax of ten cents upon the vellum, parchment or paper on which is written a bill of lading for articles to be exported from a state, it could as well impose a duty of five thousand dollars and thereby indirectly tax the articles intended for export. That conclusion would by no means follow. A *stamp* duty has now, and has had for centuries, a well defined meaning. It has always been distinguished from an ordinary tax measured by the value or kind of property taxed. If Congress, in respect of a bill of lading for articles to be exported, had imposed a tax of five thousand dollars for and in respect of the vellum, parchment or paper upon which such bill was written, the courts, looking beyond form and considering substance, might well have held that such an act was contrary to the settled theory of stamp tax laws, and that the purpose and necessary operation of such legislation was, in

violation of the Constitution, to tax the articles specified in such bill and not to impose simply a stamp duty. Here, the small duty imposed, without reference to the kind, quantity or value of the articles exported, renders it certain that when Congress imposed such duty specifically on the vellum, parchment or paper upon which the bill of lading was written or printed, it meant what it so plainly said; and no ground exists to impute a purpose by indirection to tax the articles exported."

If, therefore, "the courts, looking beyond form and considering substance" in the cases at bar, shall be persuaded that the purpose and necessary operation of this legislation be to accomplish an end or object not entrusted to this government, the legislation may and should be declared unconstitutional. *McCulloch* v. *Maryland*, 4 Wheat. 316, 423. In other words, given a case in which Congress has authority to prohibit, as in the case of foreign commerce or the currency, and it may accomplish that object by prohibitory taxation. If, however, Congress has not the power to prohibit as a legitimate end or object, it may not do so indirectly under the pretext of exercising the taxing power.

It may be argued that the prohibition of yellow oleomargarine is necessary and proper to facilitate the collection of the tax on other oleomargarine, and to prevent fraud in sales of articles taxed by the government; but the argument that the prohibitive tax of ten cents per pound was laid to facilitate the collection of the tax of one-quarter of one cent on other colors of oleomargarine cannot uphold the law. Such a purpose is too remote and uncertain. In *United States* v. *Dewitt*, 9 Wall. 41, 44, the question was as to the validity of section 29 of the Internal Revenue Act of

March 2, 1867 (14 Stat. 484), which made it a misdemeanor to mix for sale or to sell or offer for sale naphtha and illuminating oils, inflammable at less than a designated temperature. It was held that the act could have no constitutional operation within state limits because it was a mere police regulation relating exclusively to internal trade of the States. Chief Justice Chase, delivering the opinion of the court and referring to the want of jurisdiction in Congress to interfere with the internal commerce of the States, said (p. 45):

> "This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion."

It was, however, urged in that case on behalf of the government that the prohibition of the sale of illuminating oil, inflammable at less than a certain temperature, was in aid and support of the internal revenue tax imposed on other illuminating oils. In answer to this suggestion, Chief Justice Chase, among other things, said (p. 44):

> "If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described. This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes."

A further conclusive answer to this contention is that there is no demand for uncolored oleomargarine, except as a substitute for lard, and as such, a true construction

of the act does not permit any tax to be laid upon it. The act taxes oleomargarine under one of two express conditions and not otherwise, that is when "made in imitation or semblance of butter," or, "when so made, calculated or intended to be sold as butter or for butter" (Section 2). It is plain that oleomargarine manufactured in the usual way is not in imitation or semblance of butter, unless it is colored yellow, because it is pure white, or almost pure white, in appearance, whilst practically all butter which goes on the market is uniformly colored a high shade of yellow throughout the year. It is no less plain that oleomargarine so made is not calculated or intended to be sold as or for butter, and not even as a substitute for butter, because it can be sold only as a substitute for lard. A product which does not look like butter, and which can be sold only as a substitute for lard, is not oleomargarine within the definition of the act for the purpose of taxation. This is the construction placed on the act by Attorney-General Garland in his letter of October 18, 1886, to the Secretary of the Treasury (18 Op. Atty.-Gen. 489). This opinion was accepted as final and has ever since been acted on by the Treasury Department (Oleomargarine regulations, June, 1902, p. 12); and the Commissioner of Internal Revenue has specifically decided, under the authority vested in him by section 14 of the act, that oleomargarine designed only as a substitute for lard is not subject to any tax, although it has a shade of yellow color (Treasury Decisions, Vol. 6, No. 3, p. 36).

III.

THE RESTRICTIONS UPON THE TAXING POWER CONTAINED IN THE FIFTH AMENDMENT.

As we have already seen, the first ten amendments to the Constitution of the United States were adopted as limitations upon the powers delegated to Congress "in order to prevent misconstruction or abuse of its powers" by means of "declaratory and restrictive clauses." It has never been determined whether the provisions of the Fifth Amendment prevent the abuse of the taxing power by means of arbitrary and discriminating taxes, the effect of which would be to deprive an individual or a selected class of liberty and property without due process of law.

So far as is disclosed by a careful perusal of the debates in the constitutional conventions at the time the Constitution was ratified, as well as of the debates in Congress when the first ten amendments were proposed, it does not appear that the provision requiring 'due process of law' contained in the Fifth Amendment was mentioned as protecting the individual against arbitrary or discriminating taxation. The import of the words may or may not have been assumed to apply to taxation as well as to all other powers in the exercise or abuse of which the rights of the individual might come in conflict with the powers of government. The same thing may also be said of the circumstances surrounding the adoption of the Fourteenth Amendment shortly after the close of the Civil War, and yet it is established beyond question that the requirement of 'due process of law' in the

later amendment clearly applies to the taxing power of the States.

There is, however, no principle of constitutional construction which would permit the court to say that because the question of arbitrary or discriminating taxes was not in the minds of those who framed and adopted these amendments, "in order to prevent misconstruction or abuse of its powers" by the national government, the Fifth Amendment should not be applied to an abuse of the taxing power as well as of any other power. The taxing power was the most important and far-reaching of the powers conferred; it was the one the absence of which above all others had rendered the government under the Articles of Confederation impotent and imbecil; it was the one most liable to abuse; it was the one around and about which waged the contest for ratification of the Constitution, and it was the one which of all powers could obviously "as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised."[1]

But even if it could be shown that the abuse of the taxing power was not in the minds of the people at the time these amendments were adopted and that the framers perceived and apprehended no danger from the abuse of that power, this fact would not tend to limit the scope of the amendments if the case now presented be fairly within their spirit and letter. As was said by Chief Justice Marshall in the famous

[1] *Loan Association* v. *Topeka*, 20 Wall. 655, 664.

case of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 644:

> "It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the constitution in making it an exception.
>
> On what safe and intelligible ground can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there in the nature and reason of the case itself, that which would sustain a construction of the constitution not warranted by its words? Are contracts of this description of a character to excite so little interest, that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously

demand their remaining exposed to legislative alteration, as to compel us, or rather permit us to say, that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed, as to exclude it?"[1]

Applying to the federal taxing power the doctrine thus lucidly stated, we may say that there is no reasonable ground which would justify the conclusion that if the abuse of the taxing power, by means of arbitrary, unequal and discriminating tax laws, had been in the minds of the framers of the Fifth Amendment, they would have varied its language so as to make it broader and more comprehensive. No one will seriously advance the proposition that public policy or the safety or perpetuity of the national government demand that Congress should have the power to impose arbitrary or prohibitive taxes upon internal industries. It would be repugnant to the very theory upon which these 'restrictive clauses' were drafted, and in conflict with the purpose sought to be accomplished by them, to now hold that there is in them no efficacy to restrict the most important power granted to Congress by the Constitution, the one most liable to abuse, and the one which at all times would most reach and affect the individual.

Indeed, it may be respectfully submitted that if it be now held that the requirement of 'due process of law' in the Constitution of the United States imposes no prohibition or limitation upon the taxing power of Congress, then the result must be that this amendment, in-

[1] See also *Slaughter-House Cases*, 16 Wall. 36, 72; *Ex parte Virginia*, 100 U. S. 339, 347, 361; *Holden* v. *Hardy*, 169 U. S. 366, 382, 385; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 676.

tended to constitute part of a bill of rights protecting the people in their individual liberties as against the majority wielding the power of government, must now be construed as if it read :

> "No person shall be . . . deprived of life, liberty or property, without due process of law, *except it be in the form of taxation;* nor shall private property be taken for public use, without just compensation, *except in cases of taxation.*"[1]

But, aside from these considerations, it is confidently submitted that had the first Congress deliberated at length upon the choice of a provision which would be most effective to prevent an abuse of the taxing power, it would have been difficult to select one more appropriate than that of 'due process of law,' or language which it was more natural for the descendants of Englishmen to have selected for that purpose. It embodied then, as now, one of those maxims of constitutional law "which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men.'"[2]

The phrase 'due process of law' or its equivalent 'the law of the land' antedated the establishment of our political institutions, and was endeared to our fathers by antiquity and tradition, as well as by the noblest historical associations. It represented the broadest and most far-reaching guaranty of personal

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[1] *County of Santa Clara* v. *Southern Pac. R. Co.*, 18 Fed. Rep. 385, 399; affirmed 118 U. S. 394, 417, 422.

[2] *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370.

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and property rights. There are no words in our language which signify or mean more in respect of the rights and liberties of the individual than either of these phrases. It is not deemed necessary, however interesting it would be, to trace the historical origin of the term 'due process of law' and the development of its meaning and scope, except to say that its first appearance in any of the great constitutional documents was probably in the Petition of Right in the third year of the reign of Charles I, and that it has ever since been regarded as having and importing exactly the same meaning as the words 'the law of the land' in Magna Charta.[1]

No statement of the general meaning of these equivalent phrases is more often quoted than that from Mr. Webster's argument in the famous *Dartmouth College case* (4 Wheat. at p. 581), viz.:

> "The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land."

The statement of Mr. Justice Story, in his work on the Constitution (5th edition, section 1945), is perhaps the most accurate, viz.:

> "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs."

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[1] *Hurtado* v. *California*, 110 U. S. 516, 521, 527, 543.

Judge Cooley, in his Constitutional Limitations, in speaking of this phrase, uses the following language (Sixth ed., p. 433):

> "While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, that condemns it as unknown to the law of the land."

The first exposition of these phrases by this court will be found in the case of *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244, where Mr. Justice Johnson, among other things, said:

> "As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that *they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.*"

This statement as to the meaning and scope of the famous phrase has been repeatedly quoted with approval by this court, as will be seen by reference to the following cases: *United States* v. *Cruikshank*, 92 U. S. 542, 554; *Hurtado* v. *California*, 110 U. S. 516, 527; *Caldwell* v. *Texas*, 137 U. S. 692, 697; *Scott* v. *McNeal*, 154 U. S. 34, 45; *Taylor and Marshall* v. *Beckham*, 178 U. S. 548, 592.

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Mr. Chief Justice Fuller in *Giozza* v. *Tiernan*, 148 U. S. 657, 662, said, speaking for the court:

> "And *due process of law* within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

See also *Duncan* v. *Missouri*, 152 U. S. 377, 382; *Thomas* v. *Gay*, 169 U. S. 264, 283; *Norwood* v. *Baker*, 172 U. S. 269, 279.

The court has never attempted to define the provision 'due process of law,' with precision and probably never will, any more than it would attempt to define the word 'justice' in the preamble to the Constitution; but nevertheless the phrase has constantly been recognized as embodying fundamental principles of right and justice which protect the individual from the arbitrary exercise of any power of government. As Mr. Justice Brown said in *Holden* v. *Hardy*, 169 U. S. 366, 389:

> "This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

It is true that the cases in this court applying to taxation the constitutional guaranty of 'due process of law' arose under the Fourteenth Amendment and related to state laws; but, after the most careful study and reflection, no reason can be perceived why the very same provision in the Constitution should have one meaning when applied to the state governments and a narrower meaning and more limited scope when applied to the national government. *Sinking Fund*

Cases, 99 U. S. 700, 718. Logically, if there could be in reason and justice any difference, it should be against the national government, which is indisputably one of limited and enumerated powers. Cooley on Taxation, p. 12. The only sound principle must be that the provision is the same in both cases as applied to the taxing power (Mr. Justice Harlan dissenting in *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 355).

If it appeared that the State in a given case could not, under the police power, prohibit or destroy commerce in a particular commodity, and was simply exercising the taxing power, it is submitted that a tax upon a commodity, which amounted to practical confiscation or prohibition of its manufacture and sale, would clearly deprive the individual of property and liberty without due process of law within the meaning of the Fourteenth Amendment. In the *Powell* case as well as in the *Plumley* case it was recognized that a statute under the police power which prevented all sales in a legitimate article of commerce would not be valid. *Powell* v. *Pennsylvania*, 127 U. S. 678, 685; *Plumley* v. *Massachusetts*, 155 U. S. 461, 467.

Mr. Justice Harlan, in the opinion of the court in the *Lottery Case* (at p. 363) recognized that, in the exercise of the power to regulate commerce among the several States, Congress could not act arbitrarily, but was "subject to the limitations imposed by the Constitution upon the exercise of the powers granted," and there is no reason to suppose that the learned justice did not mean to refer particularly to the most comprehensive and far-reaching of all limitations embodied in the constitutional guaranty of 'due process of law.' In *Inter-*

state Commerce Comm. v. *Brimson*, 154 U. S. 447, 479, the learned justice also said: "It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guaranties." The very same reasoning must apply to the exercise of the taxing power.

Assuming, for the reasons above stated, that the restrictive clause of the Fifth Amendment applies to the exercise of the taxing power, then its prohibition or limitation should be enforced in its spirit and to its entirety as fully as if it were part of the very article conferring the taxing power. *Prout* v. *Starr*, 188 U. S. 537, 543. As Mr. Justice Brewer said in the case of *Fairbank* v. *United States*, 181 U. S. 283, 288:

> "We are not here confronted with a question of the extent of the powers of Congress but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is as heretofore noticed the help

found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

The act of Congress of May 9, 1902, purports to levy what is strictly and technically an excise upon the manufacture and sale of an article of food. *Patton* v. *Brady, Executrix*, 184 U. S. 608, 618. An *excise* is generally included in the term *tax* which, "in its most enlarged sense, embraces all the regular impositions made by government upon the person, property, privileges, occupations, and enjoyments of the people for the purpose of raising public revenue. . . . Taxes are distinguished from arbitrary levies in that they are laid according to some rule which apportions the burden between the subjects thereof. An exaction which is made without regard to any rule of apportionment is therefore not a tax, and is not within the constitutional authority of the government."[1] Chief Justice Marshall defined 'taxation' to be "the simple operation of taking small proportions from a perpetually accumulating mass, susceptible of almost infinite division."[2] What would he have said of an alleged tax which took all?

There is undoubtedly a difference between a land or property tax and an excise upon a business or upon the manufacture and sale of a commodity. An excise may be upon the article, or its value, or its quality, or its quantity, or its weight; but however the amount be determined, whether by specific or *ad valorem* taxes or

[1] *Cooley's Pr. Const. Law*, Third ed., p. 56.
[2] *Gibbons* v. *Ogden*, 9 Wheat. 1, 199.

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duties, or both methods, although it need not be inherently equal, it must operate alike on all persons within the class selected or who exercise the same privilege.

The most satisfactory definition of an excise is to be found in the Massachusetts reports. It is true that the Massachusetts constitution requires excises to be 'reasonable,' but the following definition is not therefore without general application. A leading case is that of *Oliver* v. *Washington Mills*, 11 Allen, 268, 274, 279, where Bigelow, C. J., speaking for the Supreme Judicial Court, said:

> "An excise, on the other hand, is of a different character. It is based on no rule of apportionment or equality whatever. It is a fixed, absolute and direct charge laid on merchandise, products or commodities, without any regard to the amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those by whom the charge is to be paid. . . . It only remains for us to consider whether the assessments laid on the defendants can be supported as a valid exercise of the power to impose excises. . . . In the first place, it is grossly unequal, and does not operate alike on all persons whose property is made subject to it. It was declared by this court in *Portland* v. *Apthorp*, *ubi supra*,[1] that 'Taxes of this sort must undoubtedly be equal'; that is, must operate alike on all persons who exercise a particular employment or enjoy the same privilege or commodity. The same doctrine was affirmed in the recent case of *Commonwealth* v. *People's Savings Bank*, *ubi supra*.[2] The reason is obvious. In the language of the court, an unequal excise would be 'contrary to the principles of justice.' That the excise in ques-

[1] 12 Mass. 252, 255.

[2] 5 Allen, 431.

> tion operates unequally in this sense cannot be doubted."

This definition of an excise was cited by the Attorney-General of the United States (Hon. Charles Devens) in the opinion furnished to Congress for its guidance (15 Op. Attys.-Gen., p. 219), adding that such an excise " may be increased or diminished by the extent to which the privilege is exercised."

Assuming that an excise must operate alike on all persons whose property or business selected for taxation is substantially the same in character, and that an arbitrary and discriminating excise would be 'contrary to the principles of justice' and would not constitute 'due process of law,' it remains to consider whether the excise now before the court is arbitrary and discriminating as contended by the plaintiffs in error.

The act of Congress purports to lay an excise tax upon oleomargarine. Congress, of course, knew, as its very definition discloses, that oleomargarine was a substitute for butter and that this quality and essence alone gave it commercial value or utility. The act imposes a tax of ten cents per pound upon yellow oleomargarine, which is shown to be prohibitive, and under the authorities above discussed such prohibitive operation must be presumed to have been the purpose of Congress. For all legitimate purposes of taxation, oleomargarine, whether colored or uncolored, is practically the same thing, and there are no inherent differences between them which would warrant their separation into two distinct classes. In the nature of things, reasoning solely according to the rules which should govern the imposition of taxes, white

oleomargarine ought not to be taxed one-quarter of a cent a pound and yellow oleomargarine forty times as much, and, in the absence of some ulterior motive, such discrimination would never have been attempted. No conceivable reason can be suggested for the discrimination based alone upon the yellow color, other than that it competes with another and *untaxed* article of commerce, namely, butter. On the very face of the act, it is declared that this discrimination of ..early four thousand per cent. in the amount of the tax imposed is made solely because oleomargarine in its commercial form looks like butter. Such legislation, it is submitted, is just as arbitrary and indefensible as if Congress were to endeavor to lay a capitation tax upon men of red hair, and it were to be argued in support of such a law that it was constitutional because apportioned.

It cannot be denied that the tax on yellow oleomargarine in the case at bar is an extraordinary piece of legislation, unusual in our system of government, and of a kind heretofore happily rare. On its face, it imposes an enormous and disproportional penalty upon the mere fact of coloring a wholesome and nutritious article of food, whilst another competing food product, practically the same substance produced in a different way, is left untaxed. The proof shows that in its practical operation the necessary effect of the discrimination is the destruction of an industry conducted within the jurisdiction of a State, by which the plaintiffs in error and thousands of others are deprived of a means of livelihood in a legitimate trade.

When we say that the federal tax on oleomar-

garine is arbitrary, we do not mean to say that Congress was actuated by no reason in making the discrimination. We concede that it had a reason and sought to accomplish a definite object, namely, to prevent the manufacture and sale of yellow oleomargarine because it looks like and competes with colored butter; but what we do mean to assert is that it was actuated by no reason which, under the Constitution of the United States, it could properly entertain, for in respect of internal commerce it has no police power whatever. A commodity cannot be taxed at a prohibitive rate simply because it necessarily resembles and competes with another. Such a reason furnishes no legitimate basis for the object sought to be accomplished. Even under the police power, a State could not prohibit an article harmless in itself merely because it looked like another with which it competes: it could only do so in order to prevent fraud.

Now, the power to tax undoubtedly involves the power to classify for purposes of taxation; but due process of law requires that classification shall be something more than mere arbitrary selection. What test then is to be applied for the determination of whether there has been legitimate classification or a mere arbitrary selection? Whatever else may be done, it must surely be that discrimination calculated only to deprive one class of persons of their occupations or property for no other purpose than to benefit another class of persons who are their business competitors is, legally speaking, a mere arbitrary selection. Thus, in the cases at bar, we find a tax of ten cents per pound upon

oleomargarine solely because it looks like and competes with butter, which is exempted from any tax. The tax depends solely upon the article being a substitute for an untaxed commodity. What difference then exists between these two articles to justify this discrimination? In their chemical composition there is substantially no difference and they are used for the same identical purpose. They compete directly in the market, but a necessary element of the marketability of each product is a certain shade of yellow which must be imparted before it can be sold. The cost of production is such that yellow oleomargarine cannot be sold in competition with colored butter if the ten cent tax be paid. Since uncolored oleomargarine cannot be sold or compete with colored butter, the result is the prohibition of the manufacture and sale of all oleomargarine in competition with butter. Therefore, the mere fact of necessary resemblance is made to support the accomplishment of but one object, namely, the suppression of the oleomargarine industry for the benefit of the butter industry. No such power was entrusted to Congress by the Constitution. It is not legitimate classification, but mere arbitrary selection which deprives of liberty and property one body of individuals for the benefit of another. As Mr. Justice Harlan said of a state statute in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563:

> "Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

What Mr. Justice Brewer said in *Gulf, Colorado & Santa Fe R'y* v. *Ellis*, 165 U. S. 150, 154, is equally applicable to the Fifth Amendment, viz.:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action. . . . The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

In *The State* v. *Loomis*, 115 Missouri, 307, 314, cited and quoted with approval in the *Ellis* case, Black, J., said:

> "Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classi-

fication for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

It is no longer open to question that the right to earn one's livelihood by any lawful calling constitutes the liberty and property of the individual and one of the inalienable privileges and immunities of every citizen of the United States which are secured by the Constitution. *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 757, 764; *Powell* v. *Pennsylvania*, 127 U. S. 678, 684; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *People* v. *Marx*, 99 N. Y. 377, 386, and *People* v. *Gillson*, 109 N. Y. 389, 399.

The contention of the plaintiffs, if adopted, would not limit the taxing power of the federal government. It would leave it free to determine the extent and method of taxation in all cases where taxation is necessary and proper to carry into execution the powers delegated by the Constitution, and to call upon the people to contribute even to the last penny if necessary to defend or preserve the Union or promote the common welfare of the Nation. It would take away no power that a civilized government ought to exercise. It would declare that in the exercise of the taxing power Congress may not impose prohibitory taxes upon internal products based upon the fact that a manufactured article resembles and competes with another product which is not taxed; in other words, that it may not destroy the property of one class of its citizens for the benefit of another class. Such a decision would be but following the duty which Chief Justice Marshall said would be imperative if the court were satisfied that a given stat-

ute purporting to lay a tax was in truth a mere pretext for unauthorized prohibition.

IV.

THE PROVISION OF SECTION 14 OF THE ACT CONFERRING JUDICIAL POWER UPON THE COMMISSIONER OF INTERNAL REVENUE.

The act in question is subject to the additional objection that the power to decide finally what articles are to be taxed cannot be conferred upon the Commissioner of Internal Revenue, who is only an administrative officer. Sec. 14 of the act provides as follows:

> "And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final."

The invalidity of this clause would seem to be established by the decision in *United States* v. *Eaton*, 144 U. S. 677, 688, where the court, speaking through Mr. Justice Blatchford, said:

> "It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offence punishable under § 18 of the act."

See also to the same effect, *United States* v. *Maid*, 116 Fed. Rep. 650, 651; *United States* v. *Blasingame*, 116 Fed. Rep. 654.

The case of *In re Kollock, Petitioner*, 165 U. S. 526, 533, did not present this point. That decision passed

only upon the power of Congress to authorize the Commissioner of Internal Revenue to prescribe regulations as to marks, stamps and brands. An entirely different question is involved in the attempt to invest the Commissioner with power to 'decide' *finally* how an article shall be taxed. No such judicial power can be granted except to the courts.

This objection is peculiar to the *Cliff* and *McCray* cases. In the *Cliff* case, the package bore a tax-paid stamp of one-fourth of one cent per pound (*Cliff* record, p. 8). The theory of the prosecution was that the package had not been "stamped according to law," within the penal intent of section 11 of the act, because it did not have a tax-paid stamp at the rate of ten cents per pound, under the requirements of section 8. The theory of the defense was that the tax required by section 8 on the package in evidence was only one-fourth of one cent per pound, because the oleomargarine was "free from artificial coloration that causes it to look like butter of any shade of yellow." The issue, therefore, was as to whether or not the package in question contained 'artificial' coloration within the true meaning of the act of Congress. Upon this issue the facts were undisputed. The government showed that the article was of the color of June butter, and that this color was imparted to it by the admixture of palm oil in its manufacture (*ib.*, p. 8). The defendant showed by competent testimony that palm oil is a vegetable oil derived from the fruit of a certain kind of palm which grows in East Africa, that it is a wholesome, edible oil, containing all the chemical constituents of butter, except butyrin, which gives to butter its flavor, that it is used by the natives of

the country where it is produced to mix with their food, that it is reddish-yellow in appearance and a very small proportion of it is sufficient to produce the color of June butter, that there is little, if any, difference between the taste of oleomargarine made in this way and the taste of butter, that it is quite as digestible as butter and is very cheap, that the oleomargarine thus produced is substantially the same article as good butter, and that the nature of palm oil is such that its use *is desirable as an ingredient in the manufacture of oleomargarine aside from its yellow color* (*ib.*, pp. 10–12). The government made no objection to this evidence, and offered none to question or dispute it (*ib.*, p. 12), except to show that the Commissioner of Internal Revenue had finally decided that the use of palm oil in the manufacture of oleomargarine does constitute 'artificial' coloration, and had instructed the prosecuting witness, a Deputy Collector of Internal Revenue, that oleomargarine thus produced is subject to the tax of ten cents per pound (*ib.*, pp. 8–10).

The facts being wholly undisputed, there was presented a pure question of law, namely, whether the admixture of palm oil in the manufacture of oleomargarine constituted 'artificial' coloration within the meaning of the act. The conviction necessarily was based upon the assumption that this question had been foreclosed by the decision of the Commissioner under authority of section 14, and that the defendant Clift was not entitled to a judicial trial upon the question whether the article he sold was or was not intended by Congress to be taxed at the ten cent rate.

In the *McCray* case it was admitted by the govern-

ment that the only coloring matter contained in the package of oleomargarine therein involved was that universally used in the United States to color butter and was contained in creamery butter which had been purchased in the open market and used in the manufacture of the oleomargarine in question as one of its elementary and necessary ingredients according to a formula used in the course of business. The Commissioner of Internal Revenue had decided that if *artificially* colored butter is used "as a component part of the finished product oleomargarine (and that finished product looks like butter of any shade of yellow), as the oleomargarine is not free from *artificial* coloration, the tax of ten cents per pound will be assessed and collected." Oleomargarine Regulations, U. S. Int. Rev., June, 1902, p. 18.

Conceding *arguendo* that Congress would have the power to tax oleomargarine containing palm oil or colored butter at ten cents per pound, nevertheless it could not authorize the Commissioner of Internal Revenue so to decide and to tax or not to tax according to his discretion. He is not a judicial officer; he has no judicial machinery; he need not even be a lawyer; he may act upon such facts as may be presented to him, and after such investigation as he may choose to make, and his decision is not subject to judicial review; indeed, he may decide on mere inspection and hence according to the hidden operation of his senses. Though Congress may invest the officers of the executive department of the government with all of the powers necessary to the adequate execution of its

constitutional laws and may confer upon them the power to determine the existence of facts as the foundation of such action as may be necessary to give effect to the declared purpose of Congress, it cannot delegate to any officer or department of government the power to 'decide' finally what articles shall or shall not be taxed.

According to the ruling of the Commissioner, the word 'artificial' is made to include 'natural,' a word of opposite meaning, for it is undisputed that the yellow color of palm oil is a *natural* color, and the exception would be, not of oleomargarine 'free from artificial coloration' but of oleomargarine 'free from coloration.' The established rule is that the intention to tax in a particular manner must be expressed in clear and unambiguous language, else it cannot be enforced, and that words of exception are to receive a liberal rather than a restricted construction, to the end that the burdens imposed upon individuals may be confined rather than extended. The rule together with its supporting authorities is stated in *Eidman* v. *Martinez*, 184 U. S. 578, 583. See also *Adams* v. *Bancroft*, 3 Sumner, 384, 387; *Schoenemann* v. *United States*, 119 Fed. Rep. 584, 587; *In re Southern Pac. Co.*, 82 Fed. Rep. 311, 313; 87 Fed. Rep. 863; *Matheson & Co.* v. *United States*, 71 Fed. Rep. 394, 395; *Rice* v. *United States*, 53 Fed. Rep. 910, 911; *Dean* v. *Charlton*, 27 Wis. 522, 526.

It is not contended that the invalidity of this provision contained in section 14 affects the other provisions of the act. Omitting the clause or declaring the legal

effect to be that the ruling of the Commissioner is only presumptively correct, will leave the act complete and harmonious. To the individual, however, will then be accorded a trial in due form upon the issue whether palm oil or any other natural product or colored butter does or does not constitute 'artificial coloration' within the true meaning of the statute. Upon that question, we have been denied a day in court; and, acting as an appellate tribunal, this court will not determine that issue but order it to be tried by the court below in accordance with the usual practice.

V.

EFFECT OF THE INVALID AMENDMENT UPON THE ORIGINAL ACT.

The power of Congress to lay a tax of two cents per pound upon oleomargarine, as was done under section 8 of the original oleomargarine act, is not questioned in these cases. It is true, in the *Broadwell* case, no tax whatever had been paid; but this was upon the ground that the amendment of May 9, 1902, being void, no tax provision remained in force. This was done for the purpose of presenting every phase of the act, and not because the plaintiffs in error are not willing to pay a fair tax to the national government. Although an unconstitutional statute cannot, by mere implication alone, operate to repeal a prior enactment, still an expression of such an intention may as well be contained in an unconstitutional statute as any

other. *Tims* v. *The State*, 26 Ala. 165, 170; *County of Orange* v. *Harris*, 97 Cal. 600, 602; *People ex rel.* v. *Fleming*, 7 Colo. 230, 236; *Meshmeier* v. *State*, 11 Ind. 482, 489; *Childs* v. *Shower*, 18 Iowa, 261, 272; *Ely* v. *Thompson*, 3 A. K. Marsh. 70, 73; *Sullivan* v. *Adams*, 3 Gray, 476, 478; *Campau* v. *The City of Detroit*, 14 Mich. 276, 285; *Devoy* v. *Mayor, &c., of New York*, 35 Barb. 264, 270; 36 N. Y. 449, 451; *City of Portland* v. *Schmidt*, 13 Oreg. 17, 20; *Shepardson* v. *Milwaukee and Beloit R. Co.*, 6 Wis. 605, 615; *State ex rel. Rogers* v. *Judge of County Court*, 11 Wis. 50, 55. And a declaration that a prior statute is amended to read in the language of the amendatory statute amounts to an unequivocal expression of an intention to repeal the original act so far as concerns any vitality distinct from the amendatory act. *People* v. *Wilmerding*, 136 N. Y. 363, 369, per Mr. Justice Peckham; *Matter of Estate of Prime*, 136 N. Y. 347, 355; *Goodno* v. *City of Oshkosh*, 31 Wis. 127, 129. Congress cannot be held to have intended to prohibit oleomargarine provided the Constitution will permit it to do so and by the same act to tax it in case the prohibition were unconstitutional. To so hold would be judicial legislation. *Spraigue* v. *Thompson*, 118 U. S. 90, 94; *James* v. *Bowman*, 190 U. S. 127, 141.

Conclusion.

It results that sections 8 and 14 of the act of Congress of August 2, 1886, as amended by the act of Congress of May 9, 1902, should be declared unconstitutional for

the reasons above discussed, and that the judgment in each case should be reversed.

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Washington, October Term, 1903.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

AUGUST CLIFF,
Plaintiff in error,
vs.
THE UNITED STATES.
In error to the District Court of the United States for the Northern District of Illinois.

221
No. ~~679~~, October Term, 1902.
No. 221, October Term, 1903.

FREDERICK J. SCHICK,
Plaintiff in error,
vs.
THE UNITED STATES.
In error to the District Court of the United States for the Northern District of Illinois.

222
No. ~~680~~, October Term, 1902.
No. 222, October Term, 1903.

WILLIAM BROADWELL,
Plaintiff in error,
vs.
THE UNITED STATES.
In error to the District Court of the United States for the Northern District of Illinois.

223
No. ~~676~~, October Term, 1902.
No. 223, October Term, 1903.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

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Washington, October Term, 1903.

[18,842, 18,843, 18,844, 18,952.]

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[18,842, 18,843, 18,844, 18,952.]

OLEOMARGARINE TAX CASES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

AUGUST CLIFF, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 614, October Term, 1902. No. 221, October Term, 1903.
FREDERICK J. SCHICK, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 615, October Term, 1902. No. 222, October Term, 1903.
WILLIAM BROADWELL, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 616, October Term, 1902. No. 223, October Term, 1903.

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

I.

The brief filed on behalf of the United States would seem to contend, that because the act of Congress in question purports upon its face to be an exercise of the taxing power, "the appeal lies alone to the people and not to the courts" (Gov. brief, p. 25). In other words, the argument amounts to this, that although the object sought to be accomplished by Congress may have been one clearly not entrusted to

the national government, nevertheless if that object can be accomplished by means of adopting the form of a tax law, the citizen is remediless. Thus, the mere form, and not the substance, is to control in determining the validity of the exercise of the taxing power. The position of the Government on this point apparently is that Congress may, by a prohibitory or discriminating tax, or, as it is now called, a "regulatory tax," destroy the internal manufactures of a State and thereby indirectly accomplish what Congress could not do directly. This corollary of the argument on behalf of the Government is said to be supported by the decisions of this Court in regard to the taxing power of Congress.

The plaintiffs in error, however, confidently submit that if this court shall be convinced that the object sought to be accomplished by the act of Congress in question was not taxation but prohibition of the manufacture of a legitimate article of commerce, such object to be determined by the practical operation and necessary effect of the legislation, it will declare the act unconstitutional as to the internal commerce of the States, and apply again the great principle of constitutional jurisprudence that the substance and not the shadow, the truth and not the pretense, ever determines the validity of any exercise of power by Congress as well as by any state legislature, and "that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result." This was the language of Mr. Justice Brewer *in speaking of the taxing power of Congress*, in the recent case of *Fairbank* v. *United States*, 181 U. S. 283, 294,

295, 300, and so, too, in *McCulloch* v. *Maryland*, 4 Wheat. 316, 423, Chief Justice Marshall was discussing the taxing power of a State, and conversely, the taxing power of Congress, when he said:

> "Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

In *Norwood* v. *Baker*, 172 U. S. 269, 278, Mr. Justice Harlan said:

> "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property."

Judge Cooley, in his great work upon Constitutional Limitations (7th ed.), said (pp. 695, 705):

> "Having thus indicated the extent of the taxing power, it is necessary to add that certain elements are essential in all taxation, and that it will not follow as of course, because the power is so vast, that everything which may be done under pretence of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax, and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government. . . .
>
> If either of these questions is answered in the negative, the legislature must be held to have assumed an authority not conferred in the general grant of legislative power, and which is, therefore,

> unconstitutional and void. 'The power of taxation,' says an eminent writer, 'is a great governmental attribute, with which the courts have very wisely shown extreme unwillingness to interfere; but if abused, the abuse should share the fate of all other usurpations.'"[1]

In *Patton* v. *Brady, Executrix*, 184 U. S. 608, 621, Mr. Justice Brewer quoted the following from Cooley on Taxation, p. 34:

> "But so long as the legislation is not colorable merely, but is confined to the enactment of what is in its nature strictly a tax law, and so long as none of the constitutional rights of the citizen are violated in the directions prescribed for enforcing the tax, the legislation is of supreme authority."

This language clearly recognizes that, if the court be satisfied that tax legislation is colorable merely and is not in its nature strictly a tax law, there is no reason why the court should decline to adjudge according to the truth.

It is hardly meeting the argument of the plaintiffs in error to suggest that it is based "upon some notion of an implied limitation on Congress, inherent in that instrument, or upon some implied power in this court to review the legislative action in laying a tax" (Gov. brief, p. 23). The limitation upon Congress as to the internal manufactures of the States is not a notion, nor does it arise by implication: it is expressed in the plain command of the Tenth Amendment, which reserves to the States the regulation of their internal commerce as one of "the powers not delegated to the United States by the Constitution." No one on behalf of the plaintiffs in error has consciously suggested that there is any

[1] Sedgwick on Const. and Stat. Law, 414.

implied power in the court to review legislative action in laying a tax, but it is asserted that Congress by labelling an enactment a tax law cannot thereby place itself above the law and the Constitution that is supreme over all legislative powers or withdraw its authority by means of a tax law, and that the courts "are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." Since *Marbury* v. *Madison*, 1 Cranch, 137, 178, it has been undisputed that "this is of the very essence of judicial duty." It is not to be announced that there is so much judicial duty if the legislation purports to be a tax law or an amendment of what this court has held to be a tax law.[1]

The Constitution of the United States protects the individual against the irresponsible or arbitrary exercise of power by any branch of the national government, and Congress is not above the law nor supreme in the exercise of any power. *Kilbourn* v. *Thompson*, 103 U. S. 168, 190; *United States* v. *Lee*, 106 U. S. 196, 220.

As Mr. Justice Brewer said in *Cutting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 84:

> "It has been widely and rightly said that this is a government of laws and not of men; that there is no arbitrary power lawfully in any individual or body of individuals; but that all its authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them."

[1] Mr. Justice Harlan in *Hepburn* v. *Griswold*, 8 Wall. 603, 625.

The plaintiffs in error are pleading in this court for the right to pursue a legitimate trade by honest methods, and they deny the right of Congress to interfere with them and suppress their business on the ground that other manufacturers or retail dealers are guilty of fraud. They have cheerfully submitted to the most drastic regulations for the prevention of fraud; they favor the present rigid regulations of the Treasury Department which practically prevent fraud and protect the consumer against imposition; they simply want to be allowed to follow their trade and obtain their livelihood in the manufacture of what this court has declared to be a legitimate article of commerce, which is recognized as such in every country in the world, and which has created no adverse criticism except where it has competed with butter, and there solely because it is a wholesome and economical substitute for butter.

II.

It is not necessary to follow the Solicitor-General through the door which he would open "*pro arguendo* to facts properly excluded by the courts below" (Gov. brief, p. 58). The matters that he thereupon submits to this court would indeed be most prejudicial to the plaintiffs in error in any other forum than a court of justice. It is true that some persons engaged in the oleomargarine industry have been guilty of fraud; it is true that much prejudice exists in certain quarters against oleomargarine; it is true that much class legislation has been secured in numerous States of an unfair and oppressive character; it is true that prohibitory legis-

lation is to be found in many States, and that in other States there are enactments against fraud. But are these proper elements in the determination of the present question arising under the Constitution of the United States? Is the validity of this act of Congress, as a tax law pure and simple, to depend upon the fact that the commodity taxed and to be destroyed is fostered or discriminated against by any of the States? Is it possible that it is intended to suggest that if a majority of the States favored the industry, the result would be different? Is the suggestion to be entertained that a prohibitory or discriminatory or regulatory tax (to use the words of the Solicitor-General) should be upheld because the legislatures in twenty odd States seek the destruction of a competitive industry, but that the tax would be unconstitutional if these same States were favoring and fostering the industry? Is the constitutionality of an act of Congress then to depend, not on the Constitution, but on the ever varying enactments of the state legislatures? Suppose that all the laws and local regulations which are collected in the appendix to the brief of the Solicitor-General were repealed, would the act of Congress then become unconstitutional in so far as it regulated and destroyed internal commerce?

It will, however, be assumed as elementary that the determination of the question of the power of Congress to impose a "prohibitory," "regulatory" or "discriminating" tax cannot be affected one way or the other by what some of the States have seen fit to enact.

III.

A number of state statutes against frauds in the manufacture and sale of oleomargarine and food products are tabulated in an appendix to the brief of the United States.

It is difficult to perceive any fair purpose in this tabulation, for in the cases at bar there is not the remotest foundation for any suggestion of fraud. The proofs show that the plaintiffs in error in each case were selling oleomargarine in its commercial form and color for what it was with full disclosure, and that the purchaser or consumer was buying it as and for what it was.

This part of the argument of the Solicitor-General is addressed to the point that Congress was justified, as a matter of morals, in levying a prohibitory tax so as to "make it next to impossible to continue the business" (Gov. brief, p. 91). Now, if this act is to be sustained on the ground that Congress has the power to prohibit internal manufacture in an article of commerce in order to prevent fraud, then we have utterly misconceived the nature of the Federal Constitution and the purport of the decisions of this court, which were supposed to settle beyond peradventure that Congress had no power whatever to regulate the local manufactures of a State or to protect the people of the States against fraud in their internal commerce. We had supposed that if, under the constitution of Illinois, as interpreted by her courts, we had the right to pursue a legitimate business by honest methods, the Federal Congress could not validly enact any regulation which would "make it next to impossible to continue the business" in that State.

Indeed, it may impress this court, as it has profoundly impressed us, that much of the argument of the Solicitor-General virtually confesses that the tax is discriminating and prohibitory, but seeks to sustain it because the industry is unpopular or oppressed in many of the States, and, therefore, "Congress was justified in laying the discriminating tax upon the colored article" (Gov. brief, p. 57). On the other hand, it must be admitted that we had hardly anticipated that an attempt would be made to uphold the act of Congress in question by an argument based upon the police power of the States, as to which it has yet to be held that Congress has any concurrent function whatever. It is a surprise to find the act defended upon the ground that the health and morals of the people will be conserved, because "even if [oleomargarine] is candidly *sold* for what it really is, it is likely to be unwittingly *consumed* for the genuine article which it resembles. Thus the line is drawn between legitimate commerce and trade which, even if recognized, is at least disingenuous and doubtful" (*ib.*, p. 58). The italics are those of the Solicitor-General. Is it seriously contended that Congress may draw a line between the legitimate or illegitimate *internal* commerce of the States, whatever may be said of its power in that regard when regulating *interstate* commerce?

IV.

In order to maintain the point that the act in question does not encroach upon the powers reserved to the States, the most insistent argument of the Solicitor-General is based upon the fact that in forty-two of the

fifty-four States and Territories stringent laws have been enacted to prevent the sale of oleomargarine as and for butter, and that in twenty-nine (correctly twenty-five) of those forty-two States and Territories the admixture of artificial coloring matter in oleomargarine is prohibited (Gov. brief, p. 59). The Government's proposition when analyzed is that, because nearly all of the States and Territories now have laws to prevent fraud in the sale of this article, as well as of other articles of commerce, and because nearly half of them have laws forbidding artificial coloration, it is competent for Congress to lay a prohibitive tax upon all yellow oleomargarine. The mere statement of this proposition is as clear a demonstration of the soundness of the position of plaintiffs in error as could be desired. For the result would be that, while the act of Congress stands, the internal policy of over one-half the States and Territories in permitting and fostering the manufacture and sale of colored oleomargarine is to be directly overthrown and the laws enacted for the purpose simply of insuring the sale of oleomargarine without fraud, are rendered wholly nugatory.

As a concrete illustration, upon which the learned Solicitor-General places much reliance, reference is made to the laws of Ohio and Illinois, wherein the packages of oleomargarine involved in the cases at bar were manufactured and sold. As to the policy of Ohio in prohibiting colored oleomargarine, it is sufficient to say that, in the face of the present act of Congress, the State of Ohio is powerless to adopt the policy of a number of its sister States and permit the sale of colored oleomargarine under proper restrictions.

Congress was not given the power by the Constitution to render the state of Ohio impotent in this respect. On the contrary, such power was expressly denied to Congress by the reservation in the Tenth Amendment of power to the States to deal as they might see fit with their internal concerns. As to the law of Illinois, the Solicitor-General has fallen into a serious error. That State does not prohibit but freely permits the manufacture and sale of oleomargarine, colored as butter is colored, as a substitute for and in competition with butter. On June 14, 1897, the legislature of Illinois passed an act permitting the sale of oleomargarine under restrictions calculated to prevent its sale as or for butter, and also prohibited the sale of oleomargarine containing any coloration which causes it to resemble yellow butter. Laws Illinois, 1897, pp. 3–5. As to the prohibition, however, the act was held unconstitutional by the Circuit Court of Cook County as a deprivation of liberty and property without due process of law, because the effect of its operation showed that this was the object which it was calculated to accomplish and did accomplish. *People ex rel. Moxley* v. *Pease*, 30 Chicago Legal News, p. 277, April 16, 1898. No further *bona fide* attempt has been made to enforce the prohibitive feature of this act (see *McAdam* v. *The People*, 179 Ill. 316); and no further legislation of a similar character has been attempted. Evidently the remainder of the act was found to afford complete and adequate protection to the public against injury and fraud. It provides for the branding of every package with "the word 'oleomargarine,' or the word 'butterine,' or the words 'substitute for butter,' or the words 'imitation

butter,' in printed letters in plain Roman type, each of which shall not be less than three-quarters of an inch in length" (sec. 3). Every person buying oleomargarine must be informed of the nature of the substance (sec. 4). Every package of oleomargarine shipped, consigned or forwarded by any common carrier must be branded as before provided and it must "be consigned by the carriers and receipted for by its true name" (sec. 5). No person shall be allowed to have in possession or under control any package of oleomargarine, except for personal consumption or that of his family (secs. 6 and 7). No action shall be maintained upon any sale or contract made in violation of or with intent to violate this act (sec. 8). It is a misdemeanor to "deface, erase or remove any mark provided by this act, with intent to mislead, deceive, or to violate any of the provisions of this act" (sec. 9). Offenses against this act are punishable by fine and imprisonment; and the fine is recoverable "before any justice of the peace in the county where the offense shall be committed, at the instance of any person," and the state's attorney of each county is allowed $10 for each prosecution (secs. 10 and 11). Under the freedom thus afforded of manufacturing and selling wholesome oleomargarine for what it really is to persons, who cannot afford to buy butter of the same quality at a higher price, the industry in Chicago has prospered without injury to any one. As illustrations, the Moxley plant, at which the packages involved in these cases were manufactured, had grown to a capacity of three to four million pounds per month (*Cliff* record, p. 19); and Amundsen, a retail dealer who obtained his supplies from the Moxley

Company, had worked up a business among the laboring classes of Chicago amounting to 2,600 pounds per week. These customers "knew that it was oleomargarine and not butter, and they bought it because it was cheaper than butter." But, when the act of Congress now in question went into effect on July 1, 1902, this business was destroyed in so far as it competed with butter. Thereafter, only the uncolored article could be sold to be used for cooking purposes as a substitute for lard (*ib.*, pp. 17, 18, 19).

If it be established that the indirect prohibition of oleomargarine in so far as it competes with butter is within the powers given to Congress, all of these permissive regulations in so many States, and particularly in Illinois, are at once nullified by force of this act, which, under the guise of taxation, prevents the sale of oleomargarine in competition with butter.

V.

The fundamental and controlling allegation tendered to the United States for trial in each case was that the act was prohibitory in its practical operation and effect upon the internal commerce of the States, and that the court would thereby determine the validity of the law. The issue tendered by that allegation was duly tried in the Illinois cases and the evidence tended to prove that the tax was prohibitory. In the case from Ohio, the allegation of the complaint or declaration that oleomargarine cannot be sold in competition with butter if the tax of ten cents per pound be imposed and paid was admitted by the demurrer. *McCray* record, pp. 3–5.

The position then taken by the Government was

that the fact of prohibition was immaterial; and now we are met with a complete change of front by the contention that the effect of the tax is not prohibitory, but that it can be paid and the business nevertheless can be conducted at a profit.

The plaintiffs in error must insist upon disregarding many of the alleged facts sought to be imported into the case by the brief of the Solicitor-General, and they earnestly dispute the right of the Government to go outside the records. They challenge the correctness of the statement that "although this information was furnished informally, there can be no valid objection to its relevancy or accuracy" (Gov. brief, p. 83). They do so only because access to the records in the office of the Commissioner of Internal Revenue has been denied to them since the receipt of the brief on behalf of the Government, and, therefore, they have had no fair opportunity to verify the facts. They have thus been denied the right to show, if such be the fact, that practically all of the ten cent tax collected was paid under protest pending this litigation, and that the greater part, if not all, of the colored oleomargarine said to have been manufactured either paid the ten cent tax under protest or was exported to foreign countries under section 16 of the act, which exempts exports from payment of the tax.

The Solicitor-General, in an attempt to minimize the destructive effect of the act of May 9, 1902, cites figures from the Commissioner's records (Gov. brief, p. 83), to show that the decrease in production during the first fiscal year under the new act as compared with the last fiscal year under the old act was

only 51,896,415 pounds. He shows that under the new act 71,237,438 pounds were produced as compared with 123,133,853 pounds produced under the old act. *Prima facie*, these figures seem to indicate a falling off in production of only about 42 per cent., but the Solicitor-General omits to show that the figure of 123,133,853 pounds refers to the tax-paying colored oleomargarine only, and does not include the figures for the uncolored article. When explained by facts which the Commissioner's records do not fully contain, the figures exhibit a result far more destructive even than that conceded by the Government. These facts are contained in the records of each of these cases, and, in connection with the Commissioner's records, they demonstrate that the actual falling off in the production of the colored oleomargarine during the first year under the new act was not from 123,133,853 pounds to 71,237,438 pounds, a decrease of 51,896,415 pounds, or about 42 per cent., but a falling off from 123,133,853 pounds to 2,719,422 pounds, a decrease of 120,414,431, or nearly 98 per cent. The Commissioner's records cited in the Government's brief (p. 83), show that, of the 71,237,438 pounds of oleomargarine produced during the first fiscal year under the new act, only 2,719,422 pounds were colored like butter, on which the tax was paid at the rate of ten cents per pound, while the remaining 68,490,992 pounds was uncolored, on which the tax was paid at the rate of one-fourth of one cent per pound. The point made by the plaintiffs in error in this connection is that the act operates to destroy the oleomargarine industry, in so far as oleomargarine competes with butter, and the record in each case shows that oleomargarine competes with

butter only when it is colored as butter is colored. Otherwise, it is sold only in competition with lard. The reasons for this are that both butter and oleomargarine must be colored to the same standard shade of yellow in order to satisfy the demand of consumers, that oleomargarine cannot be so colored without subjecting it, under the rulings of the Commissioner, to the tax of ten cents per pound, that if so colored there is a substantial demand for oleomargarine, as such and on its own merits, by those consumers who cannot afford to pay high prices for butter, and that if not so colored there is no demand for oleomargarine except for cooking purposes as a substitute for lard. *Cliff* record, pp. 8–21; *Schick* record, pp. 8–19; *Broadwell* record, pp. 8–19; *McCray* record, pp. 2–5; Principal brief, pp. 7–14.

Counsel for the Government attempts to account largely for the great reduction in revenue effected by the new act by assuming that the rate of tax on one class of oleomargarine was reduced from two cents per pound to one-fourth of one cent per pound (Gov. brief, pp. 83, 92). The truth is, however, that no reduction whatever of the rate of tax was intended or effected by the act, but the one-fourth cent tax was a new levy on a hitherto untaxed article. The argument of the Solicitor-General is that Congress, instead of raising the tax on oleomargarine to the point of prohibition, actually reduced the tax on the only legitimate article from two cents to one-fourth of one cent per pound. But the slightest consideration of the facts will demonstrate that this argument is utterly without foundation. The tax of one-fourth of one cent per pound imposed on oleomargarine free from

artificial coloration, is laid wholly upon an article theretofore free from any tax. The records in these cases show that, prior to July 1, 1902, the date when the new act went into effect, all oleomargarine properly so called was sold as a substitute for butter, and that, therefore, it had to be colored as butter is colored in order to meet the demand of consumers. *Cliff* record, p. 19; *Schick* record pp. 16–17; *Broadwell* record, pp. 16–17. Consequently, not until after July 1, 1902, had there ever been a tax levied upon uncolored oleomargarine. The Solicitor-General concedes this fact in arguing another point. He says (p. 84), citing the *Cliff* record:

> "It must be remembered that prior to the change in the tax practically all oleomargarine was colored yellow."

The records of the Commissioner show no less clearly that the tax of one-fourth of one cent. per pound on uncolored oleomargarine was a new tax never before levied on what is now known as uncolored oleomargarine, a substitute for lard (Preliminary Report of July 23, 1903).

It is clear, therefore, as shown in our principal brief (p. 51), that this oleomargarine which the Commissioner permits to be sold upon payment of only the tax of one-fourth of one cent. per pound is not oleomargarine, properly so-called, within the definition of the act; and that the permission to manufacture and sell uncolored oleomargarine in competition with lard does not obviate the objection that the act destroys the real oleomargarine industry, *i. e.*, that which competes with the butter industry. This disposes of the argument of the Solicitor-General based upon the 68,490,992 pounds

produced during the first year's operation of the new act upon which the tax of one-fourth of one cent per pound was paid, leaving only the 2,719,422 pounds upon which the tax of ten cents per pound was paid. As to this insignificant amount, as compared with the 125,133,853 pounds produced and sold in competition with butter during the preceding year, it should be sufficient to cite the instance of the Moseley factory which, with a previous output of 2,000,000 pounds of colored oleomargarine per month, manufactured none of the colored article during the first five months, and in December, 1902, did sell 37,504 pounds only because of the abnormally high price of butter during that month (*Cliff* record, p. 19).

It is said (Gov. brief, p. 86) that the amount of tax "cuts but little figure," and for instance, that the public will have whiskey and tobacco though the tax is large in proportion to the cost of production, as experience proves. But oleomargarine is plainly different. The public will not have oleomargarine for table use unless it can be had much cheaper than butter. Therefore, a tax which requires oleomargarine to be sold for butter prices or more is prohibitive, while a higher rate on whiskey or tobacco is not.

VI.

It must be considered that counsel cannot persuade what point decided in the case of *Pollock v. United States*, 158 U. S. 428, as discussed in the opinion of Mr. Justice Brewer, tends to support the power of Congress to lay a prohibitory tax on the internal commerce of a State. The case might

be in point if Congress was taxing butter and furnishing a certificate as to its quality which the people here and elsewhere could follow in and rely upon. But Congress is not taxing or regulating commerce in butter and the Government is not issuing a certificate. It has shown no concern for the people elsewhere, because it allows oleomargarine to be exported freely without the payment of any tax [illegible].

[illegible] [illegible] [illegible] [

and are equally palatable, digestible and wholesome. But the existence of this resemblance does not furnish a reason for a prohibitory tax upon oleomargarine when butter is not taxed at all. What possible ground is there then for claiming that Congress is seeking to prevent fraud in the collection of its revenue? As matter of fact, the more colored oleomargarine sold as and for butter the greater the revenue of the Federal Government. Congress could not prohibit the manufacture of colored oleomargarine or punish frauds in its sale. If it wanted revenue, the way was not to lay a prohibitory tax. The moment the Government is driven to contend that this discriminating or regulatory tax was laid in order to prevent the sale of oleomargarine as and for butter, it concedes that the purpose of the law was not taxation but prohibition or regulation.

Appreciating that this horn of the dilemma amounted to a *reductio ad absurdum*, the suggestion is added that the purpose of the tax is to distinguish between colored and uncolored oleomargarine by laying "a heavy tax upon the colored article, inevitably imitative and fraudulent in effect" (Gov. brief, p. 58). If by this is meant that colored oleomargarine taxed ten cents per pound is inevitably imitative of the uncolored article taxed one-quarter of a cent per pound, the statement is at war with the records and well known facts. On the contrary, it has never before in the history of the industry been suggested that colored oleomargarine was imitative of uncolored oleomargarine. Equally preposterous is the suggestion that colored oleomargarine is fraudulent in its effect on uncolored oleomargarine. The brief probably was intended to

state that as colored oleomargarine is imitative of butter and may be sold fraudulently as and for butter, *an untaxed article*, therefore in order to facilitate the collection of revenue on colored oleomargarine, Congress could practically destroy it. Such an argument need only be stated to see at once its utter fallacy.

So, also, as to the statement made in the Government's brief that the debates in Congress "show a belief or conviction that the high tax on colored oleomargarine was necessary and was justified to prevent fraud in the collection of the tax upon the uncolored article; that is, the genuine variety, as it were, of oleomargarine. . . . When an article taxed is made to counterfeit an article not subject to tax, Congress may put upon it a higher tax in order to secure identification of the genuine article against the fraud or counterfeit, which, if successful, evades the tax intended to be imposed upon the genuine article" (p. 63).

Is it not taxing the credulity of the court to argue that, in order to collect a tax of one-quarter of a cent per pound upon uncolored oleomargarine, it was necessary or proper to impose a tax of forty times the amount on colored oleomargarine, which by no possibility could be fraudulently sold for the uncolored article? Equally, is it not unreasonable to expect this court to uphold a "regulatory tax" which seeks to *destroy* a counterfeit or imitation of an *untaxed* article? Whatever fraud has been practised has been with respect to butter; and, in view of the strict supervision exercised by the government over manufacturers, it is unreasonable to suppose that the payment of taxes could be evaded because of the resemblance to

butter or that Congress intended to strike at any such evil.

It is universally recognized that oleomargarine is colored for the same reason that butter is colored and for no other reason: the taste and appetite of the community demand it. White oleomargarine or white butter is distasteful. No logician can analyze or demonstrate what causes or constitutes taste. But the fact remains that taste is often absolutely controlling in human affairs. Whatever the cause may be, the color of food has much to do with its being palatable and marketable, and such a feature is frequently imperative. Too many illogical phases of human life constantly pass before this court for it to close its eyes to the truth that idiosyncrasies of taste or appetite or prejudice govern and control men in innumerable matters. We know that scientists vainly and fruitlessly urge that certain forms of manufactured food are the equivalent of other forms of natural food, but that the masses will not listen. We know that much of the food of peasants of Europe and Asia would be spurned by the poorest and humblest in the United States. We know that one of the most striking and singular features of idiosyncracy of taste and appetite on the part of ignorant peoples is their readiness to starve rather than eat what custom or palate or religion has made distasteful to them. We know that one of the most terrible wars of modern times—the Sepoy insurrection—was caused by religious aversion to an article of food which we regard as wholesome. We know that, if a statute should require beet sugar, which is a substitute for cane sugar, to be sold in its natural

yellow-brown state, the regulation would be practically prohibitive, and that the white sugar of commerce alone is what the poorest laborer demands. We know that, among the wealthy and cultivated classes of Europe, a white butter is preferred to the colored butter, and yet white butter is now generally unsalable in the United States. It is, therefore, reasonable to insist that, if butter must be colored yellow in order to make it acceptable to the taste and appetite of the community and therefore merchantable, so also must oleomargarine be colored for exactly the same reason, because it has no other commercial use or purpose than to serve as a substitute for butter.

VII.

In view of the insistence of the Solicitor-General upon the correctness of the decision of the Commissioner that palm oil constitutes "artificial coloration" within the meaning of Congress, by reason of the smallness of the quantity used in manufacture, it may be desirable to discuss this particular point at greater length than was heretofore deemed necessary.

In the first place, it is erroneously assumed in the Government's brief (p. 100) that the nature of palm oil is such that it can be used only in minute quantities. In this, the positive and uncontradicted testimony of Professor de la Fontaine to the contrary was entirely overlooked. *Cliff* record, p. 12.

The ground upon which the Commissioner holds that the admixture of palm oil having a natural yellow color, constitutes "artificial coloration," whilst the admixture of cotton seed oil or butter having also a natural

yellow color does not constitute "artificial coloration," is that, owing to the high color of the palm oil, only a very small quantity is required to produce the necessary commercial color. *Cliff* record, pp. 9–10; Oleomargarine regulations, p. 18. This distinction is wholly without foundation in reason or authority. It is clearly unreasonable to argue that a natural color may be held an artificial color according to the amount used. The established rules of construction preclude any such result, as we have shown in the principal brief, where the authorities are cited on page 74. But even if it could be supposed that Congress intended such a consequence, it could not delegate to the Commissioner the power to draw the line and to say when the amount of palm oil ceased to be a natural and became an artificial coloration, without abdicating its functions. The reason of this strange discrimination assigned by the Commissioner is that the use of such a small quantity of palm oil evinces a purpose or intent to evade the revenue law. He says (*Cliff* record, p. 10):

> "This office rules that where so minute and infinitesimal a quantity of a vegetable oil is used in the manufacture of oleomargarine as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and, therefore, that the oleomargarine so colored is not free from artificial coloration and becomes subject to the tax of 10 cents per pound."

Upon this reasoning the Solicitor-General also bases his argument (brief, pp. 94–102).

It may be possible that, if this question had been submitted to Congress, it would have included in the term "artificial coloration" any substance having such a deep natural yellow color as that only a small amount need be used to attain the requisite commercial color, or, in leaving this matter to the Commissioner, it would have specified the amount of naturally colored oil to be classed with "artificial coloration." Undoubtedly, Congress had no such difficulty in mind, for the use of palm oil was not general until after the enactment went into effect. *Cliff* record, p. 20. There is no law which prevents an evasion of this act provided it can be done without fraud. If, in view of the palm oil question, the legislation of Congress is defective to accomplish the purpose intended, the remedy is one for Congress to apply; it cannot be placed in the hands of the Commissioner.

The decisions do not leave this matter in the slightest doubt. In *Merritt* v. *Welsh*, 104 U. S. 694, it was held that the treasury department had no discretion but to classify the quality of sugar according to its color, although the color test had become entirely inadequate, and although the color of the lower class was imparted in manufacture to the higher class for the very purpose of evading the higher tax. The opinion of the court was delivered by Mr. Justice Bradley, who said (p. 701):

> "The color standard has come to be a precarious one. Still, if the government chooses to adhere to it, it is bound by it. If Congress, as it has done, adopt the color standard, it is not for the customs department to adopt a different one. When Congress chooses to do this, it will be time enough for the custom-house to follow. As before said, Congress alone has the power to lay taxes and duties

Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his loss; if they are not less marketable, who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interests of the government. If, in the case under consideration, a color standard is insufficient, a different one is ready to hand—that of the polariscope, or other chemical test. If the quantity of saccharine matter in sugar, or its state of advancement from the raw state to a condition of refinement, is desirable as a dutiable standard, let it be so declared by the laws; and then the merchant will know on what he has to depend. Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible. It has been said with much truth, 'Where law ends, tyranny begins.'"

And again (p. 704):

"If experience shows that Congress acted under a mistaken impression, that does not authorize the treasury department, or the courts, to take the part of legislative guardians, and, by construction, to make new laws, which they imagine Congress would have made had it been properly informed, but which Congress itself, on being properly informed, has not, as yet, seen fit to make. It may be that our tariff of duties is evaded by giving to sugars, in the process of manufacture, a low grade of color. If this be so, it is no more than every manufacturer does; namely, so to manufacture his goods as to avoid the burden of high duties, providing he can do it without injuring their marketability, or injuring it less than the duties involved. So long as no deception is practiced, so long as the goods are truly invoiced and freely and honestly exposed to

the officers of customs for their examination, no fraud is committed, no penalty is incurred. Heretofore, it has been thought desirable, in order to make sugars more marketable, to use artificial processes for bleaching them. The percolation of clay water through the mass was one of the means adopted. The sprinkling of refined syrups in the form of spray on the sugar in the centrifugals is another. If the manufacturer uses these bleaching processes in order to make his sugars more salable, why may he not omit to do so in order to render them less dutiable; nay, why may he not employ an extra quantity of molasses for that purpose? If after the sugars are manufactured, especially after being put up in packages, coloring matter is artificially imposed, it might be a different matter."

In *Seeberger* v. *Farwell*, 139 U. S. 608, it was expressly held that the introduction of a few cotton threads in woolen cloth for the very purpose of procuring it to be classed as part wool goods, and thus to evade the higher duty on woolen goods, would not permit the collector to classify the goods at a higher rate. The court, by Mr. Justice Blatchford, said (p. 610).

"The court, in its opinion, said that the collector, in classifying the goods, evidently assumed that the purpose of mixing the cotton with the wool was to secure a low classification, and assumed also that so small a quantity of cotton would not materially change the character of the goods, as merchandise, when offered for sale to consumers, and, therefore, looked upon the contention of the plaintiff for a lower classification as an attempt to defraud the revenue, and accordingly imposed the higher duty; that, Congress having made special provision for a lower rate of duty upon goods when composed in part of wool, without naming how much of other material should enter into their composition in order to secure such lower rate

of duty, the court was of opinion that manufacturers and importers had the right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate; that, although the goods in question contained so small an amount of cotton that the ordinary dealer in them and the ordinary examiner would not detect the cotton without a close and careful examination, that did not change the legal right of the plaintiffs to bring their goods within the operation of the clause involved, by the admixture of even a small percentage of cotton, if they could do so, and that goods made of 94 per cent. in bulk of wool and 6 per cent. in bulk of cotton fairly came within the description of goods composed in part of wool.

We concur in this view, and the judgment is affirmed."

This decision was followed in *Magone* v. *Luckemeyer*, 139 U. S. 612.

In *United States* v. *Schoverling*, 146 U. S. 76, 81, it was held, following the *Merritt* case, that "the intent of the importers to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, cannot affect the rate of duty on the gunstocks as a separate importation."

In *United States* v. *Irwin*, 78 Fed. Rep. 799, the Circuit Court of Appeals for the second circuit, speaking by Circuit Judge Wallace, said (p. 801):

"Upon the evidence in the record, we entertain no doubt that the importations in controversy were breech-loading shotguns, which before exportation were in a completed condition, ready for the market or for the sportsman's use, in number equal to that of the stocks or the barrels, but that the parts were detached, shipped in separate cases, and invoiced sepa-

rately, to enable the importer to enter them as invoiced, escape the payment of the duty upon guns, and, after importation, reassemble the parts. We are to consider to what extent this was a legitimate or a successful effort to avoid the payment of the higher duties.

It is a well-settled doctrine that intent is not an element in determining the proper classification of imported articles, and that merchants are at liberty so to manufacture and so to import their goods as to subject them to the lowest possible duties under the tariff laws."

And again, after referring to some of the decisions of this court (p. 802):

"Applying these principles to the present case, we cannot escape the conclusion that if the articles in controversy were not shotguns, in the condition in which they were imported, they were not dutiable as such, notwithstanding they had been shotguns previously, and could readily be again transformed into shotguns, and notwithstanding they had been taken apart and imported in fragments merely for the purpose of escaping the duty upon shotguns."

The principle and language of the opinion in *Morrill* v. *Jones*, 106 U. S. 466, is also directly in point. The court, speaking by Chief Justice Waite, there said (p. 467):

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case, we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to pre-

scribe. Congress was willing to admit duty free all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

Applying the *Morrill* case to the oleomargarine act, in *United States* v. *Eaton*, 144 U. S. 677, 687, the court, by Mr. Justice Blatchford, said:

"It was said by this court in *Morrill* v. *Jones*, 106 U. S. 466, 467, that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. Accordingly, it was held in that case, under § 2505 of the Revised Statutes, which provided that live animals specially imported for breeding purposes from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he might prescribe, that he had no authority to prescribe a regulation requiring that, before admitting the animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States."

In *U. S.* v. *200 Barrels of Whiskey*, 95 U. S. 571, 576, holding that a particular construction of the internal revenue law by the Commissioner of Internal Revenue was unwarranted, the court, by Chief Justice Waite, said:

"The regulations of the department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions."

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CONCLUSION.

It is, therefore, submitted that, as long as due regard is to be had for those principles of constitutional justice which were established in the days of Marshall for the protection of the States against encroachments upon their reserved powers and of the individual against the arbitrary exercise of governmental powers, no act of Congress, be it under the taxing power or otherwise, can be permitted to stand if the court is persuaded that it constitutes an attempt to accomplish an object not entrusted to the national government. Those principles are as effective today to curb Congress and the States and to keep them within their respective spheres as they were when Marshall announced them as the conclusions of this court. "They will always remain. They will stand as long as the Constitution stands. And if that should perish, they would still remain, to display to the world the principles upon which it rose, and by the disregard of which it fell." Phelp's Orations and Essays, 9.

WASHINGTON, D. C., November 30, 1903.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
of counsel for plaintiffs in error.

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OLEOMARGARINE TAX CASES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

AUGUST CLIFF,
Plaintiff in error,
vs.
THE UNITED STATES.

In error to the District Court of the United States for the Northern District of Illinois.

No. 614, October Term, 1902.
No. 221, October Term, 1903.

FREDERICK J. SCHICK,
Plaintiff in error,
vs.
THE UNITED STATES.

In error to the District Court of the United States for the Northern District of Illinois.

No. 615, October Term, 1902.
No. 222, October Term, 1903.

WILLIAM BROADWELL,
Plaintiff in error,
vs.
THE UNITED STATES.

In error to the District Court of the United States for the Northern District of Illinois.

No. 616, October Term, 1902.
No. 223, October Term, 1903.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR ON QUESTION OF JURISDICTION.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
Of counsel.

Washington, October Term, 1903.

[18,842, 18,843, 18,844.]

Plaintiff in error,

vs.

THE UNITED STATES.

In error to the District Court of the United States for the Northern District of Illinois.

FREDERICK J. SCHICK,
Plaintiff in error,

vs.

THE UNITED STATES.

In error to the District Court of the United States for the Northern District of Illinois.

WILLIAM BROADWELL,
Plaintiff in error,

vs.

THE UNITED STATES.

In error to the District Court of the United States for the Northern District of Illinois.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS
QUESTION OF JURISDICTION

I.

In the cases at bar, the proceeding
instituted by information to recover t
fifty dollars prescribed in section 11
August 2, 1886, c. 840, 24 Stat. 209, a
the act of May 9, 1902, c. 784, 32 Stat.
tion reads as follows:

> "Sec. 11. That every person
> purchases or receives for sale any

[18,842, 18,843, 18,844.]

OLEOMARGARINE TAX CASES.

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FFS IN ERROR ON
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The Judiciary Act of

Sec. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: . . .

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States . . . is drawn in question."

There can be no doubt that the proceedings below were cases within the meaning of the above provision, *i. e.*, the construction or application of the Constitution of the United States was involved and the constitutionality of a law of the United States was drawn in question. Criminal cases are included in the judiciary act of 1891 (*Motes* v. *United States*, 178 U. S. 458, 466), and an information to recover a penalty is clearly in the nature of a criminal proceeding, although the liberty of the defendant is not at stake. *Clifton* v. *United States*, 4 How. 242, 250; *Snyder* v. *United States*, 112 U. S. 216; *Lees* v. *United States*, 150 U. S. 476, 479.

Appellate jurisdiction to review the judgments below and to correct any errors of law appearing on the record would, therefore, seem to exist.

been branded or stamped according
e liable to a penalty of fifty dollars
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sections plainly recognizes the dis-
e, forfeiture and penalty.

II.

Article III of the Constitut
provides as follows:

"The trial of all crime

enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

The Seventh Amendment provides as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Section 566 of the Revised Statutes provides as follows:

> "The trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury." (Act of September 24, 1789, c. 20, sec. 9, 1 Stat. 77; Act of February 26, 1845, c. 20, 5 Stat. 726.)

Each defendant, in the cases at bar, was charged by information (*Cliff*[1] record, p. 3) with having violated section 11 above quoted, and each defendant moved

[1] As all the records are practically the same, it will be sufficient to refer to the *Cliff* record.

made upon the same grounds contained in the motion to find defendant not guilty, which motion was overruled, and to which ruling exception was duly taken (pp. 4, 23–24). Thereupon, the court rendered judgment upon the finding of guilty that the defendant forfeit and pay to the United States a fine in the sum of fifty dollars as provided by the law in question, together with the costs of the prosecution (record, pp. 4, 24). It is this judgment, rendered against the contention of the defendant that the law authorizing it was unconstitutional, that this court is now called upon to review.

The case of *Rogers* v. *United States*, 141 U. S. 548, was an action at law for the recovery of certain moneys due the United States on a bond, and the parties filed a written stipulation waiving the right of trial by jury and consenting that the cause be tried by the court without a jury, as in the cases at bar (record, p. 5). In the course of the opinion of the court, Mr. Justice Blatchford, among other things, said (p. 554):

> "There was no statute in existence which provided for the trial in the District Court by the court without a jury. It is provided by § 566 of the Revised Statutes that 'the trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury.'

ot guilty (record, pp. 6, 22) be-
ited States was unconstitutional,
nerefor all of the grounds em-
nt of errors. This motion was

otherwise triable by a jury, the parties may, by stipulation, waive a jury and agree on a statement of facts, and submit the case to the court thereon, for its decision as to the law. *Henderson's Distilled Spirits*, 14 Wall. 44, 53. That might have been done also in the Circuit Court, without any statute to that effect. *Campbell* v. *Boyreau*, 21 How. 223, 226, 227. This, however, is not the finding of issues of fact by the court upon the evidence. The provisions of §§ 649 and 700 relate wholly to such finding, and not at all to the action of the court upon an agreed statement of facts.

In the present case, the Circuit Court could not properly consider any of the matters raised by the bill of exceptions; nor can this court do so. All that the Circuit Court could do was to affirm the judgment of the District Court; and all that this court can do is to affirm the judgment of the Circuit Court. The Circuit Court had jurisdiction by its writ of error, and this court has jurisdiction in the present case."

The case of *Henderson's Distilled Spirits*, 14 Wall. 44, 53, was the case of an information to enforce a forfeiture, and it was held that the defendant could waive a jury and agree to the trial before the judge upon an agreed statement of facts, irrespective of any legislative provision upon the subject.

In the cases at bar, however, there was no agreed statement of facts but only a waiver and agreement that

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The provision for waiving a jury in § 649 of the Revised Statutes, applies only to the Circuit Court, as does also a special provision of § 700, in regard to the review by this court of a case tried in the Circuit Court by the court without a jury. There are no similar provisions in regard to trials

the information should be tried
jury. The question is, therefor
quiry whether the rule announ
applies to proceedings by way of

114 U. S. 417, 424.

The foundation of the rule in civil cases cannot be better stated than in the following language of Chief Justice Taney in *Campbell* v. *Boyreau*, 21 How. 223, 226, quoted in *Rogers* v. *United States*, 141 U. S. 548, 555:

> "The finding of issues of fact by the court upon the evidence is altogether unknown to a common law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impanelled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And as this court cannot regard the facts found by the judge as having been judicially determined

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erefore, narrowed to the in-
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ay of information to recover

Thus, it appears that the reason of this rule in civil cases is founded on the fact that no code of procedure had been provided by Congress, that it was intended that such procedure should follow the course of the common law, and that the practice at common law was to try all issues of fact in civil cases by jury. Hence it is said that "the finding of issues of fact by the court upon the evidence is altogether unknown to a common law court."

But this reasoning does not apply to a criminal case to recover a penalty, which is permitted to be instituted by information, because no jury trial in such criminal cases was known to the common law. Although the cases at bar might have been instituted by indictment, nevertheless they were also plainly such as to be properly instituted by information. *Lees* v. *United States*, 150 U. S. 476, 479; *Ex parte Wilson*, 114 U. S. 417, 423–425; *United States* v. *Block*, 4 Sawy. 211, 215; *United States* v. *Maxwell*, 3 Dill. 275, 279; *United States* v. *Shepard*, 1 Abb. U. S. 431, 438.

In the case of *In re Bonner, Petitioner*, 151 U. S. 242, 258, in speaking of the necessity of a trial by jury of an indictment or information, the court clearly has reference to that class of serious offenses involving, or

in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as

which may involve the libe
in *Callan* v. *Wilson*, 127 U
in *Thompson* v. *Utah*, 170 U

petty offenses and actions to recover small amounts without impairing the constitutional right of trial by jury. Mr. Justice Gray said (pp. 16–17):

> "By the common law, justices of the peace had some criminal jurisdiction, but no jurisdiction whatever of suits between man and man. There were in England, however, courts baron, county courts, courts of conscience and other petty courts, which were not courts of record, and whose proceedings varied in many respects from the course of the common law, but which were empowered to hear and determine, in a summary way, without a jury, personal actions in which the debt or damages demanded did not exceed forty shillings. 3 Bl. Com. 33, 35, 81. The twelve freeholders summoned to the county court of Middlesex, and authorized, when there assembled together with the county clerk, and without any judge being present, to decide by a majority, and in a summary way, causes not exceeding forty shillings, under the statute of 23 Geo. II, c. 33, (1750) commended by Blackstone, were clearly not a common law jury. 3 Bl. Com. 83, and Coleridge's note.
>
> In this country, before the Declaration of Independence, the jurisdiction over small debts, which county courts and similar courts had in England, was generally vested in single justices of the peace."

And again, referring to the holding in *Callan* v. *Wilson*, 127 U. S. 540, that a person accused of a

liberty of the citizen, as defined
27 U. S. 540, 549, 552–555, and
170 U. S. 343, 353. Mr. Justice
In *Maxwell v. Louisiana*, [illegible]
a conviction without a jury under a municipal ordinance imposing a fine of twenty-five dollars, the court, by Mr. Justice Gray, said:

> "A breach of such an ordinance is one of those petty offenses against municipal regulations of police, which in Louisiana, as elsewhere, may be punished by summary proceedings before a magistrate, without trial by jury. Louisiana Constitution of 1852, arts. 103, 124; Constitution of 1868, arts. 6, 94; *State* v. *Gutierrez*, 15 La. Ann. 190; *Mayor, &c., of Monroe* v. *Meuer*, 35 La. Ann. 1192; *Callan* v. *Wilson*, 127 U. S. 540, 553, 555."

In 4 Blackstone's Commentaries, 280, "summary proceedings" are defined as being those in which "there is no intervention of a jury" and they are described as—

> "an institution designed professedly for the greater ease of the subject by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offense."

Particularizing further, the learned commentator says (p. 281):

> "Of this summary nature are all trials of offenses and frauds contrary to the laws of the excise and other branches of the revenue. . . .
>
> Another branch of summary proceedings is that before justices of the peace, in order to inflict divers petty pecuniary mulcts and corporal penal-

criminal conspiracy could not
by a jury, Mr. Justice Gray sa
"The decision proceed

ties denounced by act of parliament for many disorderly offenses, such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others."

In Stephen's History of the Criminal Law of England, vol. 1, p. 123, the author says:

"Speaking very generally, it may, I think, be said that the general character of statutes giving summary jurisdiction to magistrates was for a great length of time to enable them to deal with matters of small importance, more particularly with offenses in the nature of trifling nuisances or disturbances of good order, jurisdiction in cases of serious crime being reserved for juries. Besides this, it was the common characteristic of these acts to leave the subject of procedure unprovided for, or provided for only in a very general and insufficient manner."

In *Williams* v. *Augusta*, 4 Ga. 509, 561, it was held that a pecuniary penalty imposed for violation of a municipal ordinance could be recovered without a jury consistently with the usual constitutional right of trial by jury.

In *Byers and Davis* v. *Commonwealth*, 42 Pa. St. 89, 94, the court, by Strong, J. (afterwards Mr. Justice Strong), said:

"Our business at present is to ascertain how far the right to a trial by jury extended—to what controversies it was applicable. It was a right the title to which is founded upon usage, and its measure is therefore to be sought in the usages which prevailed at the time when it was asserted. But never in England was there any usage, and consequently never was there any right in the subject, that every litigated question of fact should be submitted to a jury. In all that large class of cases which are cognizable in courts of equity, there never was any right of

> trial by jury; nor did the right extend to many other civil and criminal proceedings. Summary convictions for petty offenses against statutes were always sustained, and they were never supposed to be in conflict with the common law right to a trial by jury."

In *People* v. *Fisher*, 20 Barb. 652, 658, as a reason for holding that petty offenses not infamous could be prosecuted by information and tried without a jury, the court, by Welles, J., said:

> "No jury trial in criminal cases was ever known to the common law, but such as followed upon indictment in a common law court, after the accused was in custody, had been arraigned and had pleaded to the indictment."

Quoting this language with approval, the Supreme Court of Illinois, by Magruder, J., in *Brewster* v. *People*, 183 Ill. 143, 150, said:

> "As jury trials in criminal cases, as known to the common law, were such as followed upon indictment in a common law court, and as our constitution refers to the right of trial by jury as it was understood at common law, then the prohibition against the right to waive a trial by jury cannot apply to misdemeanors, because the constitution expressly provides that, in cases of misdemeanors, a person may be held to answer without indictment."

Conclusion.

It is, therefore, submitted that, in a prosecution by way of information to recover a penalty for violation of a revenue law, a jury trial is not required in the district courts by reason of any constitutional or statutory provision, and that, as such trials were had at common law before a judge without a jury, there is no reason why a defendant may not waive a jury trial or why the pro-

ceedings thereupon are not subject to review for errors of law the same as any other case within the jurisdiction of the district courts involving the constitutionality of an act of Congress.

Washington, December 12, 1903.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
Of counsel for plaintiffs in error.

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In the Supreme Court of the United States

OCTOBER TERM, 1926.

AUGUST CLIFF, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 222.

FREDERICK J. SCHICK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 223.

WILLIAM BROADWELL, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 228.

LEO. W. MCCRAY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 301.

BRIEF FOR THE UNITED STATES.

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

UGUST CLIFF, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 221.

REDERICK J. SCHICK, PLAINTIFF IN ERROR,
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THE UNITED STATES. } No. 222.

ILLIAM BROADWELL, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 223.

EO. W. MCCRAY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 301.

BRIEF FOR THE UNITED STATES.

PRELIMINARY STATEMENT.

In each of these four cases there is raised the estion of the validity of sections 8 and 14 of the t of Congress of August 2, 1886 (24 Stat., 209) as ended May 9, 1902 (32 Stat., 193), imposing a x upon the manufacture and sale of oleomarga- ne.

The first three cases were criminal prosecutions by information instituted in the United States district court for the northern district of Illinois. In each case a jury was waived, a trial had before the court, the defendant found guilty, and a fine imposed. A motion to find the defendant, upon the evidence, not guilty, was filed in each case, the motion being overruled and exceptions taken. So too, motions for new trials and in arrest of judgment were filed, overruled, and exceptions taken.

In the McCray case suit was brought in the district court of the United States for the southern district of Ohio, to recover a penalty of $50, as provided in section 11 of the act of August 2, 1886, for having purchased and received for sale oleomargarine that had not been stamped as required by law.

THE CHARGES.

The substance of the charge in the *Cliff* case was:

That on December 22, 1902, at Chicago, Ill., Cliff, a retail dealer in oleomargarine, did knowingly purchase and receive for sale from the manufacturer 10 pounds of oleomargarine artificially colored with palm oil; that the said oleomargarine was contained in a new wooden original manufacturer's package, to which no coupon stamp or stamps in the sum of 10 cents for each pound of oleomargarine contained had been affixed for denoting the payment of the internal-revenue tax, as required by law, all of which Cliff, at the time he so purchased the same, well knew.

In the *Schick* case the charge was the same, except that the artificial coloration was the Wells-Richardson butter color.

In the *Broadwell* case the charge was the same as in the *Schick* case.

In the *McCray* case the petition avers that on October 24, 1902, McCray was a retail dealer in oleomargarine in Cincinnati, Ohio; that on that date he knowingly purchased of the Ohio Butterine Company, a corporation engaged in the manufacture of oleomargarine at Cincinnati, 20 pounds of oleomargarine which contained artificial coloring matter; that the stamps affixed to the package in which the oleomargarine was contained were of the value and at the rate of one-fourth of a cent for each pound contained in the package; all of which the defendant at the time well knew.

In his answer the defendant admits that at the time stated he was a retail dealer in oleomargarine; that he purchased the oleomargarine as alleged; that the revenue stamps upon the package were of the value of but one-fourth of a cent for each pound contained therein; that he had full knowledge respecting the ingredients used in its manufacture, the formula being given. He admits that the oleomargarine was of a yellow color; but he says that color was imparted to it by the use of the creamery butter, which had been colored yellow by the use of the "Wells-Richardson's Improved Butter Color," and that it contained no other coloring matter.

He denies that the oleomargarine was artificially colored within the meaning of section 8 of the act of August 2, 1886, as amended May 9, 1902.

In his second defense he alleges the act in question to be unconstitutional and void, which is the general defense in all the cases.

To this answer the Government interposed a demurrer, which, upon hearing, was sustained, and judgment was rendered against the defendant in the sum of $50 as penalty, and for costs. To this action the defendant duly excepted and sued out a writ of error to this court.

To summarize:

In the *Cliff* case the oleomargarine had been colored by the use of palm oil, and a tax of one-fourth cent per pound had been paid thereon;

In the *Shick* case the oleomargarine had been colored by the use of the "Wells-Richardson's Improved Butter Color," and a tax of 2 cents per pound had been paid thereon;

In the *Broadwell* case the oleomargarine had been colored by the use of the "Wells-Richardson's Improved Butter Color," and no tax whatever had been paid thereon; and

In the *McCray* case the oleomargarine had been colored by the use of creamery butter, which butter had been artificially colored by the use of the "Wells-Richardson's Improved Butter Color," and a tax of one-fourth cent per pound had been paid thereon.

ASSIGNMENT OF ERRORS.

As the errors assigned in the *Cliff* case embrace all those assigned in the other cases (with one exception), it will be sufficient to state the errors in that case, with the additional assignment in the McCray case.

In the *Cliff* case the errors alleged are:

I.

In refusing to hold that the provisions of the act of Congress relating to oleomargarine and butter of August 2, 1886, as amended by the act of Congress of May 9, 1902, under which the defendant was convicted, are in contravention of the Constitution of the United States and the amendments thereto, because—

(1) The said provisions deprive the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law.

(2) The said provisions constitute an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States.

(3) The said provisions invest an inferior executive officer with the power finally and arbitrarily to determine essentially judicial questions concerning vast property rights.

(4) The said provisions so arbitrarily discriminate against the oleomargarine industry in favor of the butter industry in the United States as to

be repugnant to the fundamental principles of equality and justice inherent in the Constitution of the United States.

II.

In striking out and refusing to consider proper evidence offered and received on behalf of defendant, showing—

(1) That the natural color of butter varies at different seasons of the year, from almost pure white in the winter season to a high shade of yellow in the spring season, if made from the milk of grass or clover fed cows; and that all butter during all seasons of the year, including that made from the milk of grass or clover fed cows, is uniformly colored a shade of yellow somewhat deeper than the natural color of June butter before it is put on the market.

(2) That there is no demand in the market for butter having only its natural color, except June butter, and that there is no demand in the market for oleomargarine for table use unless the same is colored a shade of yellow which causes it to look like yellow butter.

(3) That oleomargarine is a substitute for and competes with butter, and that the market demand for both butter and olemargarine requires that they shall have a uniform color of a shade of yellow during all seasons of the year.

(4) That the cost of production of oleomargarine is such that after payment of a tax of 10 cents

per pound thereon when colored, as required by the act of Congress relating to butter and oleomargarine of August 2, 1886, as amended by the act of Congress of May 9, 1902, the same can not be sold in competition with butter.

(5) That the operation and effect of said act of Congress as amended, relating to butter and oleomargarine, are to prevent the people of the United States from obtaining oleomargarine in the condition in which they want it, and to destroy the oleomargarine industry in the United States, and unjustly to discriminate against the same in favor of the butter industry. (R., p. 26.)

The additional assignment of error in the *McCray* case is the following (R., p. 8):

(III) If said act be not in contravention of the Constitution of the United States of America, then said court erred in holding that oleomargarine which contains no other artificial coloration than that imparted to it by the use of butter which itself contains coloring matter and which therefore causes said oleomargarine to look like butter of a shade of yellow, is subject to a tax of 10 cents per pound instead of a tax of one-fourth of 1 cent per pound.

ARGUMENT.

There is involved in these cases the validity of sections 8 and 14 of the oleomargarine law. The pertinent portions of these sections are as follows:

> SEC. 8. That upon oleomargarine which shall be manufactured and sold, or removed

for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a packet shall be taxed as a pound: *Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound. (Act of May 9, 1902; 32 Stat., 194.)

SEC. 14. And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final.

The law is given in full as Appendix "A" to this brief.

The plaintiffs in error contend that these provisions violate the Constitution and the amendments thereto, in that—

(1) They encroach upon and interfere with the powers reserved to the several States;

(2) They deprive the plaintiffs in error of liberty and property without due process of law;

(3) They invest an administrative officer with the power finally to determine essentially judicial questions.

I.

THE PROVISIONS ATTACKED DO NOT ENCROACH UPON OR INTERFERE WITH THE POWERS RESERVED TO THE SEVERAL STATES.

In entering upon a discussion of this question it becomes necessary at the outset to ascertain the character of the tax imposed and of the law in question. That the tax is an excise can not be doubted (*Patton* v. *Brady*, 184 U. S., 619); and that the act is to be deemed a revenue measure has been declared by this court (*In re Kollock*, 165 U. S., 536). In the latter case the validity of those provisions of section 14 of the act under consideration which empower the Commissioner of Internal Revenue to designate the character of the brands which shall be placed upon oleomargarine before its sale, was assailed as being an attempted delegation to that officer of judicial power. In reaching the conclusion that those provisions were not open to objection, the court discusses the character of the act, the Chief Justice, speaking for the court, saying (p. 536):

> The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue.

After referring to the authority conferred upon the Secretary and the Commissioner of Internal Revenue by section 3446 of the Revised Statutes, to

change the character of the mark or label used on tobacco or distilled spirits, and to make and publish regulations respecting their use, the court continues (p. 537):

> The oleomargarine legislation does not differ in character from this, and the object is the same in both, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue. Protection to purchasers in respect of getting the real and not a spurious article can not be held to be the primary object in either instance, and the identification of dealer, substance, quantity, etc., by marking and branding must be regarded as means to effectuate the objects of the act in respect of revenue.

The amendment to section 8 made by the act of May 9, 1902, does not change the character of the law. It must still be regarded as a revenue measure.

The tax being an excise and the act a revenue measure, in what way does the imposition of this tax interfere with or encroach upon the *power* of the *States* to regulate the manufacture of oleomargarine? The opposing argument amounts to this: That by the imposition of the tax the Government diminishes profits, compels the product to be branded so as to render it more difficult to sell it as a substitute for butter, and by so doing diminishes the demand and output. That therefore by diminishing the demand for the article in the

colored form the Federal authority illegally regulates and restricts its production, which is wholly a matter for State control.

But this is clearly a mistaken conception of the situation. This tax is a *burden* imposed by Congress. The result of any tax is necessarily more or less onerous. It is not regulation within the constitutional meaning of the term as obnoxious now to National and again to State authority. Congress does not go outside of its domain to "regulate," and regulates (so to speak) or controls the business only so far as is legitimate to discover the selected objects of taxation and to assess and collect the tax thereon. Congress lays down certain rules, mainly to assure publicity and verity as to the real character of the article, so that taxables may be surely reached, so that the law may not be readily evaded. All this is incident to the *burden* of the tax; it is not unconstitutional regulation. It may be true that business has been affected, temporarily or even permanently—so far as markets may have been disturbed and conse quent readjustments made necessary—this again is an incident, a national incident and legitimate result of the *burden* of the tax.

The system under which spirituous and malt liquors and tobacco are taxed offer a precise counterpart. Is it not within the power of Congress to decide that the article oleomargarine shall be assimilated to these other articles in the method and manner of taxation?

No reason can be perceived why Congress may determine for itself the reasons and justifications for an onerous internal-revenue tax on strong drink and tobacco, and may *not* determine for itself the reasons for the taxation herein involved. If public morals and the general welfare are affected in both cases, it is for Congress to weigh and settle these considerations, however they may differ in degree or kind as applied to either case, and thereupon to assimilate the oleomargarine scheme to the scheme of taxing spirituous and malt liquors and tobacco. The analogy of the method, at least, if not of the essential elements, was evidently in the mind of Congress, because some of the laws affecting tobacco were *eo nomine* [in sec. 3] applied to oleomargarine. (Secs. 3232–3241, 3243, Rev. Stat.)

Congress, thus, for the purpose of assuring the collection of the tax, has imposed certain terms or conditions upon the manufacture of the article. In reality Congress prescribes no conditions in the nature of internal regulation, as to when, where, how, out of what ingredients, or by whom oleomargarine shall be manufactured. The fact is that Congress does not act upon the article until after it is manufactured and ready to enter into commerce. It takes the article as it finds it and says that upon the uncolored article a certain tax shall be paid and upon the colored a different tax. It interferes with no regulation by the States, but leaves them free to say whether within their limits

it may or may not be manufactured, and if so, in what manner and upon what conditions. This is not a regulation of or an interference with the power possessed by a State.

In *Nicol* v. *Ames* (173 U. S., 509) there was involved the validity of that provision of the war-revenue act of 1898 which imposed a tax upon all sales made at any exchange or board of trade. The act required that in making such sales a written memorandum thereof should be made, upon which the stamp, denoting the tax, should be placed. It was contended that this was an attempt on the part of Congress to regulate the making of contracts, and therefore an invasion of the powers of the States. But the court, speaking by Mr. Justice Peckham, held otherwise, saying (p. 523):

> The act does not assume to in any manner interfere with the laws of the State in relation to the contract of sale. The memorandum required does not contain all the essentials of a contract to sell. It need not be signed, and it need not contain the name of the vendee or the terms of payment. The statute does not render a sale void without the memorandum or stamp which by the laws of the State would otherwise be valid. *It does not assume to enact anything in opposition* to the law of any State upon the subject of sales.
>
> * * * * *
>
> The means actually adopted do not illegally interfere with or obstruct the internal

> commerce of the States, nor are such means a restraint upon that commerce so far as to render the means adopted illegal.

This language completely answers the similar contention made here.

In *Knowlton* v. *Moore* (178 U. S., 41) we find the same objection being made against the Federal inheritance tax then under discussion. It was insisted that in imposing a tax on legacies or successions, Congress was interfering with the power of the States to regulate the transmission or receipt of property by death. The court, speaking by Mr. Justice White, answers this argument in the following language (p. 59):

> But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the Government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the Government having the mission to regulate. But when it is accurately stated, the proposition denies

> the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National Government from almost every subject of direct and many acknowledged objects of indirect taxation. * * * It can not be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since *it leads to the necessary* conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the Government admittedly have belonged to them.

Again (p. 60):

> Under our constitutional system both the National and the State governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established.

These cases seem conclusive upon the point that in imposing the tax in question Congress has not encroached upon or in any manner interfered with the power of the States to regulate the manufacture and sale of oleomargarine.

II.

THE LIMITATIONS UPON THE POWER OF CONGRESS TO IMPOSE EXCISES.

The tax, then, is clearly an excise and the law a revenue measure. This being true, what limitations are there to be found in the Constitution upon the taxing power of Congress? The power to lay the tax *in question* is conferred by Article I, section 8, clause 1 of the Constitution, which declares that—

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

The only limitation upon the power of Congress to impose excise taxes is the condition that they shall be uniform throughout the United States. What is the meaning of the word "uniform" as used in this clause of the Constitution?

In the *Head Money Cases* (112 U. S., 594), the court, speaking by Mr. Justice Miller, says that a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." And in *Knowlton* v. *Moore* (178 U. S., 106), the court, speaking by Mr. Justice White, says that "by the result then of an analysis of the history of the adoption of the Constitution

it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic but simply a geographic uniformity."

The tax, then, imposed by this law, is not open to the objection that it is not uniform in its operation.

III.

CONGRESS MAY CLASSIFY PROPERTY FOR PURPOSES OF TAXATION.

The proposition that Congress, in imposing taxes, may classify property for taxation is too well settled to need discussion. I refer the court to the case of *Magoun* v. *Illinois Trust and Savings Bank* (170 U. S., 283); to *Nicol* v. *Ames* (173 U. S., 509), and to the cases therein cited.

IV.

THE LIMITATIONS IMPOSED UPON THE TAXING POWER OF CONGRESS BY THE FIFTH AMENDMENT.

As shown in proposition II, the only restriction upon the power of Congress contained in that clause of the Constitution which confers the power to levy the tax, is that the excise when imposed shall be uniform throughout the United States. The tax laid here is in harmony with that restriction.

But it is insisted that the law violates those provisions of the fifth amendment, which declare that—

(*a*) No person shall be deprived of liberty or property without due process of law;

(*b*) Nor shall private property be taken for public use without just compensation.

As to the latter clause, it is sufficient to say that it refers only to a direct appropriation of property for public purposes, and not to a so-called "taking" as the effect of taxation, nor under the prohibitive result of State police laws. (*Legal Tender Cases*, 12 Wall., 551; *Transportation Co.* v. *Chicago*, 99 U. S., 642; *Mugler* v. *Kansas*, 123 U. S., 668.)

Loan Association v. *Topeka* (20 Wall., 655), cited by opposing counsel, does not affect this case. That was a suit to recover upon a bond issued in aid of a private enterprise, while the taxes imposed upon oleomargarine are paid into the Treasury of the United States and devoted to public uses. The limitation of the right of taxation recognized in that case was along "the line which distinguished the public use for which taxes may be assessed from the private use for which they may not."

As to the first clause of the Fifth Amendment referred to: Does this tax, when imposed upon colored oleomargarine, deprive the manufacturer or the dealer of his liberty or of his property without due process of law? No complaint seems to be made against the imposition of the tax of one-quarter cent per pound upon uncolored oleomargarine; the complaint is directed wholly against the imposition of the tax of 10 cents per pound

upon the artificially colored article. It is conceded, if this be a "legitimate" tax law, it is constitutional (Mr. Guthrie's brief, p. 34); but it is claimed that the exercise of the taxing power is a mere pretext "for the accomplishment of objects not entrusted to the Government;" that under the guise of taxing the attempt is made to regulate the manufacture of the article, which is beyond the power of Congress, that power being vested wholly in the States.

The original act (act of August 2, 1886, 24 Stat., 209) was entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," and imposed, in addition to certain license taxes, an excise of 2 cents upon each pound of oleomargarine manufactured and sold. The validity of the tax imposed by that act seems never to have been questioned; indeed, it was so clearly within the power of Congress that no one could reasonably hope to have it declared invalid. Certain features of it, however (the authority vested in the Commissioner of Internal Revenue to designate the manner in which oleomargarine should be branded), were assailed in *In re Kollock* (165 U. S., 526), but were sustained, with certain comments on the nature of the law, *ut supra*.

The act of May 9, 1902 (32 Stat., 193), after making some minor changes in the act of 1886 in section 3, amends section 8 of the original law by imposing a tax of one-fourth cent per pound upon

uncolored oleomargarine and a tax of 10 cents per pound upon oleomargarine when found to contain artificial coloring that causes it to look like butter. As shown by its title, this act provides for four things: (1) It makes oleomargarine and *other imitation* dairy products subject to the laws of the States and Territories into which they are transported; (2) changes the tax on oleomargarine; (3) imposes a tax upon and provides for the inspection, etc., of certain other imitation dairy products, viz, adulterated, process, or renovated butter, and (4) amends the act of 1886.

It will be observed by an inspection of the act that it provides for the taxation and regulation of "adulterated" and "process" or "renovated" butter, the tax upon the former being fixed at 10 cents per pound and upon the latter at one-fourth cent per pound. Special license taxes are imposed upon the manufacturers and the dealers therein. The oleomargarine regulations are made to apply to the butter taxed. Colored oleomargarine and adulterated butter are placed in the same category and taxed at 10 cents per pound, while process or renovated butter and uncolored oleomargarine are placed in a different class and taxed one-fourth cent per pound.

Taking, then, the act of 1886 and inserting in their proper places the amendments made by the act of 1902, we have a law which does nothing more than to impose specific taxes upon certain-named articles—colored and uncolored oleomarga-

rine, *inter alia*—the money received therefrom to be paid into the Treasury of the United States. Nothing else appears in the act, save the provisions providing for the collection of the tax and for the prevention of frauds upon the revenue. As held in *In re Kollock* (*supra*), the act primarily is a revenue act.

AS TO NOTICE, HEARING, AND RIGHT OF APPEAL.

In considering this phase of the question, viz, whether due process of law is provided, the distinction between an excise and a property tax must be kept in mind. What might not constitute due process in case of a property tax may clearly be so in the case of an excise. Generally, in case of a property tax, there is a valuation of the property by an assessing officer. The amount of the tax will depend, of course, upon the value placed upon the property by that officer. In such case, due process would require notice and an opportunity to be heard, at some time, in the matter of the tax.

But the tax here involved is an excise, a specific tax upon each pound of oleomargarine; the amount is fixed by law. The collection of the tax is devolved upon certain named officers—the Commissioner of Internal Revenue and his subordinate officers. These officers have fixed seats of office, open at all times, with opportunity to be heard. In case there is a disagreement between a collector and a manufacturer as to whether any article is

subject to the tax, or as to the rate of the tax, the article is to be submitted for the inspection of the Commissioner of Internal Revenue, whose decision is made final. (Section 14 of the act.) An appeal is therefore provided from the decision of the assessing officer to the Commissioner. In the case of a substance in oleomargarine alleged to be deleterious to health (section 14 of the original act of 1886) there is a further appeal from the decision of the Commissioner to a board composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Secretary of Agriculture, whose decision upon such matter is made final. There is a similar provision as to process butter under section 5 of the act of 1902.

Here, then, due notice is given by the law itself as to the liability to the tax; an appeal is provided from the decision of the collector to the Commissioner in case of a dispute respecting the taxability of the article; and a further appeal is allowed from the decision of the Commissioner where the article is claimed to be deleterious to health. So here is due notice, an opportunity for hearing, and for an appeal—in short, due process. The court has in a recent case broadly sustained executive proceedings as due process. (*The Japanese Immigrant case*, 189 U. S., 86.)

V.

"IMPLIED LIMITATIONS" UPON THE TAXING POWER.

Plaintiffs in error must concede that Congress has the power to impose an excise upon oleomargarine, and they offer to pay what they call a "fair tax." But they say this tax is excessive and confiscatory; therefore (in effect) they say that it loses its character as an excise and becomes something else—a prohibition upon the oleomargarine industry. And, while there is no express limitation in the Constitution upon the power of Congress to levy this variety of tax, other than that it shall be uniform, upon some notion of an implied limitation on Congress, inherent in that instrument, or upon some implied power in this court to revise the legislative action in laying a tax, although this court has disclaimed any such power, they ask the court to declare this tax invalid.

What has the court said with respect to the power of Congress to tax?

Beginning with *McCulloch* v. *Maryland* (4 Wheat., 316), we find Chief Justice Marshall saying (p. 431) that "the power to tax is the power to destroy." Counsel for the plaintiffs in error answer this by saying that it only shows "the dangers which lurk in a brilliant epigram."

Chief Justice Marshall said no idle word in his opinions. He did not utter brilliant epigrams. The characteristic mark of his judgments and of the reasoning and logic by which he enforced them

is that, tested by time and events, he thought out to the furthest reach of the human intellect the meaning of his language and traced its remotest bearings and effect. When he laid down his famous propositions, like this one, he was conscious of their fullest import and deliberately intended what they obviously meant. No one standing before this bar can doubt or challenge this fact, however sincerely he may think that no human intellect, even one of the greatest, is infallible.

Chief Justice Marshall then continues (p. 431):

> Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

Nothing is said about an implied limitation upon this power.

In *Gibbons* v. *Ogden* (9 Wheat., 1) we find Chief Justice Marshall, in defining the extent of the power of Congress to regulate commerce, again saying (p. 196):

> This power, *like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.* These [limitations] are expressed in plain terms. * * * The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are,

> in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from abuse. They are the restraints on which the people must often rely solely, in all representative governments.

No intimation is to be found in this language about an implied power, lodged somewhere in the Constitution, which would authorize the court to declare void the laws of Congress imposing taxes in harmony with the limitations expressed therein.

But this view does not find expression alone in the opinions in *McCulloch* v. *Maryland* and *Gibbons* v. *Ogden*. Over and over again it has been repeated by this court down to the present time. Time and again has the court said that, subject to the exception that Congress can not tax exports, and to the restrictions that it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity, the power of taxation in Congress is unlimited; and that if the power be exercised oppressively, the appeal lies alone to the people and not to the courts.

Thus, speaking by Chief Justice Chase in the *License Tax Cases* (5 Wall., 462), the court says (p. 471):

> It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress can not tax exports, and it must impose direct taxes by the rule of apportionment, and

> indirect taxes by the rule of uniformity. *Thus limited, and thus only*, it reaches every subject, and may be exercised at discretion.

This language was quoted with approval in *Knowlton* v. *Moore* (178 U. S., 41), Mr. Justice White speaking for the court (p. 58):

> It is not denied that, subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all usual objects of taxation. Indeed, as said in the *License Tax Cases* (5 Wall., 462, 471), after referring to the limitations expressed in the Constitution, "thus limited, and thus only, it (the taxing power of Congress) reaches every subject, and may be exercised at discretion."

It is also quoted with approval by Mr. Justice White in his concurring opinion in the case of *Dooley* v. *United States* (183 U. S., 151, 166).

In *Pacific Insurance Co.* v. *Soule* (7 Wall., 433), the court, speaking by Mr. Justice Swayne, discussing the limitations of the Constitution upon the power of Congress to levy taxes, says (p. 443):

> Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature. *Congress may prescribe the basis, fix the rates, and require payment as it may deem proper.* Within the limits of the Constitution it is supreme in its action. *No power of supervision or control is lodged in either of the other departments of the Government.*

Again (p. 446):

> The taxing power is given in the most comprehensive terms. The only limitations imposed are: That direct taxes, including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles exported from any State. *With these exceptions, the exercise of the power is, in all respects, unfettered.*

In *Austin* v. *The Alderman* (7 Wall., 694), Mr. Justice Swayne, delivering the opinion of the court, says (p. 699):

> The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy.

In *Veazie Bank* v. *Fenno* (8 Wall., 533), this court, speaking by Chief Justice Chase, in answering the contention that because the tax was oppressive, the court should declare the law invalid, says (p. 548):

> It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.
>
> The *first answer* to this is, that the judicial can not prescribe to the legislative departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised

> oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So, if a particular tax bears heavily upon a corporation, or a class of corporations, it can not, for that reason only, be pronounced contrary to the Constitution.

Opposing counsel (Mr. Guthrie's brief, p. 45) try to escape the effect of this language by stating that the tax was sustained upon the ground that Congress, in the exercise of its authority to regulate the currency, could adopt any suitable means for that purpose, and not upon the ground that the court could not interfere with the discretion of Congress in the imposition of the tax. The court sustained the tax upon both grounds. The court says that "the *first answer is* that the judicial can not prescribe to the legislative departments of the Government limitations upon the exercise of its acknowledged powers." And then, after using the language above quoted, the court continues (p. 548):

> *But there is another answer* which vindicates *equally* the wisdom and the power of Congress.

And then proceeds to uphold the tax upon the further ground that Congress has the power to regulate the currency. So it was unnecessary, in deciding *Hepburn* v. *Griswold* (8 Wall., 603), and *National Bank* v. *United States* (101 U. S., 5, 6), to assign any reason for the judgments other than

that of the power to regulate the currency. In the *Hepburn* case, the question of taxation was neither involved nor raised; while in the *National Bank* case, the court follows the decision in the Veazie Bank case. The court says in the *Veazie Bank* case there are *two* reasons why the tax should not be declared invalid—because of its lack of power to prescribe a limitation upon Congress in exercising its legitimate functions, and because Congress has the authority to regulate the currency.

And Mr. Justice Gray, speaking for the court, in *Spencer* v. *Merchant* (125 U. S., 355), says:

> In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, "*The judicial department can not prescribe to the legislative department limitations upon the exercise of its acknowledged powers.* The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

FURTHER AS TO THE SEPARATE POWERS OF THE THREE COORDINATE BRANCHES OF THE GOVERNMENT.

It is insisted (in effect) that this court should invade the province of the legislative branch of the Government, and, although acting within the limits of its acknowledged powers, should supervise its action. This, the court has said, it can not properly do.

Thus, in *Hayburn's Case* (2 Dallas, 410), the court said: "That by the Constitution of the United States, the Government thereof is divided into three distinct and independent branches, *and that it is the duty of each to abstain from, and to oppose, encroachments on either.*"

In *Calder* v. *Bull* (3 Dallas, 386), there was involved the validity of a resolution passed by the legislature of Connecticut, setting aside the decree of a court of probate of that State disapproving of a will and granting a new trial. This resolution, it was claimed, was *ex post facto*, and therefore void. But the court, each member delivering an opinion, held the term *ex post facto*, as used in the Federal Constitution, applied only to crimes, pains, and penalties. Mr. Justice Iredell, in his concurring opinion, points out that in Connecticut the legislature, or general court of that State, originally possessed and exercised all legislative, executive, and judicial authority, and that from time to time they distributed the two latter powers in such manner as they thought proper. Speaking then of a government in which these powers have been separated and vested in distinct branches, he discusses the power of one branch to declare void the acts of another when the latter is acting within the scope of its authority, saying (bottom p. 398):

> If, then, a government, composed of legislative, executive, and judicial departments were established by a constitution which

imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I can not think that, under such a government, any court of justice would possess a power to declare it so. Sir William Blackstone, having put the strong case of an act of Parliament, which should authorize a man to try his own cause, explicitly adds, that even in that case "there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as to leave no doubt whether it was the intent of the legislature, or no." (1 Bl. Com., 91.)

In order, therefore, to guard against so great an evil, it has been the policy of all the American States, which have, individually, framed their State constitutions since the Revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the legislature of a State, violate those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort

to that authority, but in a clear and urgent case. If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court can not pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest of men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights, in which the subject can be viewed: First, if the legislature pursue the authority delegated to them, their acts are valid. Second, if they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust; but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act. * * *

It is not sufficient to urge, that the power may be abused, for, such is the nature of all power—such is the tendency of every human institution; and it might as fairly

> be said, that the power of taxation, which is only circumscribed by the discretion of the body, in which it is vested, ought not to be granted, because the legislature, disregarding its true objects, might, for visionary and useless projects, impose a tax to the amount of nineteen shillings in the pound. We must be content to limit power where we can, and where we can not, consistently with its use, we must be content to repose a salutary confidence. It is our consolation that there never existed a government, in ancient or modern times, more free from danger in this respect than the Governments of America.

In *Griswold* v. *Hepburn* (8 Wall., 603) Mr. Justice Miller (with whom concurred Mr. Justice Swayne and Mr. Justice Davis) in his dissenting opinion comments upon the opinion of the court in declaring the act of 1862, making the notes and bills of the United States a legal tender for the payment of all debts, to be inconsistent with the Constitution, saying (pp. 637, 638):

> But it is said that the law is in conflict with the spirit, if not the letter, of several provisions of the Constitution. * * *
>
> This whole argument of the injustice of the law, an injustice which if it ever existed, will be repeated by now holding it wholly void, and of its opposition to the spirit of the Constitution, is too abstract and intangible for application to courts of justice, and is, above all, dangerous as a ground

on which to declare the legislation of Congress void by the decision of a court. It would authorize this court to enforce theoretical views of the genius of the Government, or vague notions of the spirit of the Constitution and of abstract justice, by declaring void laws which did not square with those views. *It substitutes our ideas of policy for judicial construction, an undefined code of ethics for the Constitution, and a court of justice for the National Legislature.*

Such is not my idea of the relative functions of the legislative and judicial departments of the Government. Where there is a choice of means the selection is with Congress, not the court. If the act to be considered is in any sense essential to the execution of an acknowledged power, the degree of that necessity is for the legislature and not for the court to determine.

The decision of the court in this case was overruled, in part, in the *Legal Tender cases* heard before the entire court; and the views above expressed by Mr. Justice Miller are not only in harmony with the ultimate decision of the court in the Legal Tender cases, which is settled law to-day, but are in strict accordance with many earlier and later decisions of this court as here reviewed.

In the *Legal Tender cases* (12 Wall., 457) the court, answering the objection that the Legal Tender acts were prohibited by the spirit of the Fifth Amendment, which forbids the taking of private

property for public use without just compensation or due process of law, says (p. 551) that "that provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."

Further answering this contention, the court continues (p. 552):

> Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional; *and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.*

Respecting the division of powers under the Federal Constitution, this court, speaking through Mr. Justice Miller, in *Kilborn* v. *Thompson* (103 U. S., 168), says (p. 190):

> It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to governments, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these respective departments shall be broadly and clearly defined. *It is also essential to the successful working of this system that the persons intrusted with power in any*

> *one of these branches shall not be permitted to encroach upon the powers confided to others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.*

In *Treat* v. *White* (181 U. S., 264) there was involved the validity of the provision of section 25, Schedule A, of the war-revenue act of June 13, 1898 (30 Stat., 458), which imposed a tax of 2 cents on each $100 in value of all sales, or agreements to sell, etc., shares or certificates of stock in any association, company, or corporation.

It was contended that this provision was invalid because, while imposing the tax upon all sales, agreements of sale and agreements to sell, such shares or certificates of stock, it imposed no tax upon agreements to buy such stocks. Respecting this contention, the court, speaking by Mr. Justice Brewer, says (bottom p. 268):

> That no stamp duty was imposed on agreements to buy furnishes no ground for denying the validity of the stamp duty on agreements to sell. The power of Congress in this direction is unlimited. *It does not come within the province of this court to consider why agreements to sell shall be subject to the stamp duty and agreements to buy not.* It is enough that Congress in this legislation has imposed a stamp duty upon the one and not upon the other.

In *Patton* v. *Brady, Collector* (184 U. S., 608), the court, speaking by Mr. Justice Brewer, overruled a similar contention, saying (p. 623):

> Our conclusion, then, is that it is within the power of Congress to increase an excise as well as a property tax, and that such an increase may be made at least while the property is held for sale and before it has passed into the hands of the consumer; *that it is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount, or the property upon which it is imposed.*

In *Champion* v. *Ames* (188 U. S., 321), speaking in respect of the right of this court to interfere with the discretion of Congress when acting within the scope of its power, Mr. Justice Harlan, delivering the opinion, says (p. 363):

> But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in *Gibbons* v. *Ogden*, when he said: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

The Constitution has provided the authority and the method for proper revision of legislative action in the veto power conferred on the President by Article I, section 7, clause 2. To the Executive, then, is given the right to supervise and check legislation which he deems, in the exercise of his constitutional power of judgment and discretion, to be unwise or unjust.

For these reasons the conclusion seems irresistible that Congress, having acted clearly within the scope of its undoubted power in imposing this excise, this court is not invested with authority to review the discretion reposed in that body by the people and to declare the tax invalid if, perchance, in its opinion, the tax may seem to be oppressive. To do so, as shown by Mr. Justice Iredell in *Calder* v. *Bull*, would merely be to substitute the judicial judgment for that of the legislative power. As the court has said, if Congress has abused its power the remedy lies with the people and not in the courts.

VI.

SECTION 14 DOES NOT CONFER JUDICIAL POWER UPON THE COMMISSIONER OF INTERNAL REVENUE; OR, SO FAR AS IT MAY INCLUDE A QUASI-JUDICIAL FUNCTION, IT IS VALID UNDER THE DECISIONS OF THE COURT.

Counsel also except to the following provision of section 14 of the act:

> And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for

> his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final.

It is claimed that this is an attempt on the part of Congress to confer upon an executive officer judicial power. But it is not. It is nothing more than a conferring of authority to ascertain facts, and to apply the law to the facts when ascertained. True, it is a quasi-judicial power; but every taxing officer is invested with that. There is a great distinction between such authority and judicial power within the meaning of the Constitution. The Commissioner in determining whether an article is oleomargarine, or whether it is artificially colored, does not hear and decide a case as a judge does. He simply exercises the judgment and discretion generally required of all administrative officers, and specifically required under many laws, similar in principle, which have been sustained by the court. In order to a correct determination of the facts an analytical chemist and a microscopist are furnished who make the tests necessary to determine the character of the article. This, in the case of oleomargarine, is but the determination of a scientific fact by a scientific process. His decision must be based upon the result of these tests, and the testimony of the experts making them. If the matter were committed to the decision of a court the court would be compelled to determine the question upon the same test and

upon the testimony of like experts. And so if the matter were submitted to a jury. There is no reason why an executive officer may not decide questions of this character in matters of taxation. The question is purely one of fact; the principle of judicial power is not involved. This is not a matter involving title to property, or a right of action against some adversary party; it is not the subject of a suit at common law, or in equity, or admiralty; it is but the ascertainment of certain facts in a matter of taxation and applying the law to those facts.

In support of the position of the Government that the provision challenged is not an attempt to confer judicial power within the constitutional meaning of the term, the attention of the court is called to the following cases:

In *Martin* v. *Mott* (12 Wheat., 19, 29, 31) there was involved the validity of the act of Congress of 1795, which conferred upon the President the power to call upon the militia of the States to prevent invasion, etc. The court upheld the act, holding that Congress had the right to vest exclusively in the President this power, and that his decision upon the matters so committed to him is conclusive upon all other persons.

In *Railroad Co.* v. *Stimpson* (14 Peters, 448, 458), the court held (p. 458) that where the law confers upon an officer the authority to do certain acts, upon evidence and proofs to be laid before him,

no other tribunal is at liberty to reexamine or controvert the sufficiency of such proofs when the law has made such officer the proper judge of their sufficiency and competency.

Murray's Lessees v. *Hoboken Land Company* (18 How., 272).

There was involved in this leading case the power of Congress to vest in the accounting officers of the Treasury the authority to examine the accounts of collectors, to ascertain any balances due, upon which finding distress warrants might issue for any sums so found due the Government from the collectors. It was contended that by so providing in the act of May 15, 1820, Congress attempted to confer upon executive officers judicial powers, and further, that such a taking of property would be without due process of law. Discussing these objections, the court, speaking by Mr. Justice Curtis, says (bottom p. 275):

> Taking these two objections together, they raise the questions, whether, under the Constitution of the United States, a collector of customs, from whom a balance of account has been found to be due by accounting officers of the Treasury, designated for that purpose by law, can be deprived of his liberty, or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, secondly, whether the warrant in question was such due process of law.

The court, after discussing the nature of the power conferred, and the history and meaning of due process of law, held that the power conferred *was not judicial*, in the sense in which that term is used in the Constitution, and that due process of law had been provided, saying (p. 280):

> That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795 (12 Wheat., 19), or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. (*United States* v. *Ferreira*, 13 How., 40.) It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution.

Again (p. 284):

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter

> which, from its nature, is the subject of a suit at common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. * * * Thus it has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title (citing cases).

The question involved in the cases here before the court is not "the subject of a suit at common law, or in equity, or admiralty."

Again (p. 282):

> It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others.

Speaking with respect to the nature of the power conferred upon the officers of the General Land Office, and of the power of a court of equity to review their action in cases of fraud, etc., this court, speaking by Mr. Justice Matthews in *Craig* v. *Leitensdorfer* (123 U. S., 189), says (p. 211):

> This doctrine is undoubtedly true, but its limitation is found in the statement that such rulings "may be reviewed and annulled by the courts when a controversy arises founded upon their decisions." The jurisdiction to determine such questions does not arise in the courts of the United States by virtue of any power of supervision given to them whereby they have a right to control, to correct, to reverse, and to dictate the procedure and action of executive officers within the scope of the duties confided to them by law. No such power of revision is given, and none such can be exercised. *Such a function is not judicial; it is administrative, executive, and political in its nature.*

In *Bushnell* v. *Leland* (164 U. S., 684), it was claimed that the power vested in the Comptroller of the Currency to appoint a receiver for an insolvent bank, etc., was unconstitutional. The court answers this claim by saying (bottom p. 685) that "all of these contentions have been long since settled, and are not open to further discussion." Citing *Kennedy* v. *Gibson*, 8 Wall., 498; *Casey* v. *Galli*, 94 U. S., 673; *United States* v. *Knox*, 102 U. S., 422.

The court, speaking by Mr. Justice Gray in *Fong Yue Ting* v. *United States* (149 U. S., 698, 714), said:

> It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of acts of Congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.

The court then cites instances in which such questions have been vested in executive officers for determination. Thus the power has been vested in the President alone to surrender fugitives from the justice of other countries, vesting in the Secretary of the Treasury the power to determine claims for the recovery of duties illegally exacted, citing cases (p. 714).

The court, speaking by Mr. Justice Harlan, reaffirmed this principle in *Lem Moon Sing* v. *United States* (158 U. S., 538, 544), quoting with approval the following passage from *Nishimura Ekiu* v. *United States* (142 U. S., 651, 660):

> But, on the other hand, the final determination of those facts may be entrusted by Congress to executive officers; and in such a case, as in all others in which a statute gives a discretionary power to an officer to

> be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.

In *Chin Bak Kan* v. *United States* (186 U. S., 193) the court, speaking by the Chief Justice and referring to the findings of fact by a United States commissioner under the Chinese exclusion laws, again sustained the principle of the finality of such findings.

In *United States* v. *Moline* (82 Fed. Rep., 592) the authority of the Secretary of War to determine whether a particular structure is an obstacle to navigation is held to be a purely administrative function and to be a valid delegation of power by Congress.

See also *Chatfield* v. *New Haven* (110 Fed. Rep., 788).

The power to impose certain requirements by Department regulations, in pursuance of a law which was challenged as an illegal delegation of judicial power, just as the power to determine facts here is so challenged, has been upheld in numerous cases, in accordance with the rule in *In re Kollock* (*supra*); among others, in *Grady* v. *United States* (98 Fed. Rep., 238), respecting a power conferred upon the Postmaster-General to make rules and regulations under the postal laws;

and in *Dastervignes* v. *United States* (122 Fed. Rep., 30), respecting the authority of the Secretary of the Interior to make regulations as to forest-reserve lands.

In *Weimer* v. *Bunbury* (30 Mich., 201) there was involved a State law authorizing summary proceedings under certain circumstances to recover from a delinquent officer taxes which he had collected but failed to cover into the treasury. Judge Cooley delivered the opinion of the court, and discusses the meaning of "due process" and "judicial process," saying (p. 211):

> There is nothing in these words, however, that necessarily implies that *due process* of law must be *judicial process*. Much of the process by means of which the Government is carried on and the order of society maintained is purely executive or administrative. * * * But the proceedings for the collection of the public revenue afford still better illustration. Almost universally these are conducted without judicial forms and without the intervention of the judicial authority, the few cases in which statutes have required the action of courts being exceptional. Where such action is not required, the proceedings are regarded as purely administrative, and any hearing allowed to parties in their progress has not been in the nature of a trial, *but as a means of enlightening the revenue officers upon the facts which should govern their action*. This has been so from time immemorial, and it

> has never been supposed that the taxpayer had a constitutional right to resist the tax because he had never had any judgment against him on a judicial hearing to fix the amount.

These views exactly apply to the present situation and to the method of procedure provided by the law.

Judge Cooley continues (bottom p. 212):

> There are, unquestionably, cases in which expressions have been used implying the necessity for a common-law trial before, in any instance, a man can be deprived of his property; but they will be found on investigation to be cases calling for no such sweeping statement. *If any court has ever decided that judicial proceedings are of constitutional necessity in appropriating property under the power of taxation, the case has not been brought to our attention, and has been overlooked in our investigation.* * * * *Administrative process of the customary sort is as much due process of law as judicial process.* We should meet a great many unexpected and very serious embarrassments in government if this were otherwise.

In *State* v. *Harmon* (31 Ohio St., 250), it was claimed that the action of the State senate in deciding a contested election of a judge of a court was void, being an exercise of judicial power. Respecting this the court says (p. 258):

> It is said authority to hear and determine

a controversy upon the law and fact is judicial power.

That such authority is essential to the exercise of judicial power, is admitted; but it does not follow that the exercise of such authority is necessarily the exercise of judicial power.

The authority to ascertain facts, and to apply the law to the facts when ascertained, appertains as well to the other departments of the Government as to the judiciary. Judgment and discretion are required to be exercised by all the departments.

See also *Musser* v. *Adair* (55 Ohio St., 466); *Anderson* v. *Timme* (60 Wis., 344); *Donahue* v. *Will County* (100 Ill., 107–110).

VII.

THE EFFECT OF THE ALLEGED VOID PROVISION AND AMENDMENT.

It is suggested that in case the provision in section 14 of the original act, and the amendment of section 8 of that act by section 3 of act of 1902, be held void, the entire law falls, and counsel refer to a number of cases which bear upon the question of void amendments as working a repeal of the law. These authorities do not, however, meet the question here.

This is not a penal law, but a revenue measure, and therefore its provisions are to be liberally construed. If the court were to hold invalid that provision of section 14 which confers upon the

Commissioner authority to determine finally what substances are subject to the tax, the only effect would be to take from that officer finality of decision; and upon a prosecution for the purpose of imposing punishment, or a suit to recover a penalty, that question might be gone into anew. The act would be complete without that provision, and the only effect such a decision could have would be to strike the provision from the act. As said by this court, speaking through Mr. Justice Harlan, in *Field* v. *Clark* (143 U. S., 649, 696, 697):

> Unless it is impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid.

It is also a well-settled rule that where certain parts of an act are void, and other parts valid, if the valid portions are separable and, standing alone, will fully carry out the purposes of the act, the court will not declare the whole act void, but will give effect to the valid provisions. (*Packet Co.* v. *Keokuk*, 95 U. S., 89; *Allen* v. *Louisiana*, 103 U. S., 83–84; *Railroad Co.* v. *Schutte*, 103 U. S., 142; *Penniman's Case*, 103 U. S., 716–717; *Supervisors* v. *Stanley*, 105 U. S., 312; *Virginia Coupon cases*, 114 U. S., 304; *Presser* v. *Illinois*, 116 U. S., 263–264; *Huntington* v. *Worthen*, 120 U. S., 102; *Eilenbecker* v. *Plymouth County*, 134 U. S., 40; *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 636.)

The cases of *Spraige* v. *Thompson* (118 U. S., 94) and *James* v. *Bowman* (190 U. S., 141), cited by counsel, are not to the contrary. The laws involved in those cases were declared wholly void, because to give effect to the valid portions only would be to extend the operation of the laws beyond the intention of the legislative body, and, to that extent, would be judicial legislation. And the *Spraige* case has been so distinguished by this court. (*Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 636.)

So, in the *Trade-Mark Cases* (100 U. S., 82, 98), the court held the entire act invalid for the reason that to hold the statutes valid in so far as they applied to trade-marks used in commerce with foreign nations and among the several States would be to give to the words used by Congress a narrower meaning than they were manifestly intended to bear, a power not within the judicial province.

No one will pretend to say that, by declaring void the provision of section 14 called in question, the act can not be fully carried into effect; or that, but for that provision, Congress would not have enacted this legislation. That provision is not material to the imposition and collection of the tax, but is merely an incident to facilitate its collection.

With respect to amended section 8, conceding, merely for the purposes of argument, that the amended section is void, what effect will that

have upon the original law? What effect does a void amendment have upon a valid law? The Government contends that if the amendment be void, since there is no express repeal in the act of 1902 of any provision of the act of 1886, section 8, as enacted by the law of 1886, is in full force, and therefore that all oleomargarine, irrespective of its color, is subject to a tax of 2 cents per pound. This must be so if the amendment be void, for, as said by Mr. Justice Harlan, speaking for the court in *Norton* v. *Shelby County* (118 U. S., 442):

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

If Congress had, by express language, repealed the old law, the amendment of 1902 being held void, there would, of course, be in existence no law imposing a tax upon the article. But the act of 1902 does not, by express language, or by any language or implication, repeal any provision of any law; hence, if the amendment of section 8 is of no effect, the original section is in full force.

VIII.

REPLY TO THE BRIEFS FOR PLAINTIFFS IN ERROR.

In discussing the issues raised by these cases, reference has heretofore been made to the points suggested in the briefs of opposing counsel only so far as necessary to carry out the general line of

argument presented. I now take up the objections more at large.

(1) The act is a revenue measure, and does not attempt to regulate the manufacture of oleomargarine.

I have already touched upon this question, contending that there is no interference with State powers and that Congress has the power to select the objects of taxation, to determine the rate, and to provide the means for the collection of the tax. Having the power to designate the manner of the collection of the tax, it may throw around its collection such safeguards as, in its judgment, it deems necessary in order to prevent frauds upon its revenue. In the determination of the rate and in the selection of the means of enforcement, Congress may take into consideration the character of the article to be taxed, the purpose for which it is used, its methods of use, and the probability of fraud for the purpose of evading the tax. In passing this law, therefore, Congress could properly take into consideration all facts of which it had knowledge, or which might be brought to its notice respecting the character of oleomargarine, the uses to which it is put, the manner of its use, and, acting upon that information, lay the tax and provide for its collection, using such means as it deemed appropriate and necessary.

Counsel for the Chicago dealers in their brief (p. 17) concede that in examining into the motive

or purpose which Congress had in view in passing the act, it is not proper to refer to the debates; and counsel for McCray, while conceding the rule (brief, p. 14), quotes certain extracts from the debates as "illustrative of the history of the law and the condition of the country and existing legislation at the time it was passed." But the extracts quoted show only the views of those quoted as to the purpose of the tax, which this court will not consider. The rule upon this point is stated by Mr. Justice Davis in *United States* v. *Union Pacific Railroad Co.* (91 U. S., 79) in this language:

> In construing an act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. (*Aldridge* v. *Williams*, 3 How., 24; *Preston* v. *Browder*, 1 Wheat., 120.)

And, in *Soon Hing* v. *Crowley* (113 U. S., 703, 710), the rule is stated in these words, Mr. Justice Field delivering the opinion:

> The rule is general with reference to the enactments of all legislative bodies that the courts can not inquire into the motives of

> the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.

And this rule has been reaffirmed in *Powell* v. *Penna.*, 127 U. S., 685, 686; *United States* v. *Freight Association*, 166 U. S., 318; *Camfield* v. *United States*, 167 U. S., 523; *Dunlap* v. *United States*, 173 U. S., 75; *Maxwell* v. *Dow*, 176 U. S., 601; *Knowlton* v. *Moore*, 178 U. S., 72, and other cases. See also *Dobbins* v. *Los Angeles*, 72 Pacific Rep., 971; Cooley's Const. Lim. (6th ed.), page 231.

The reasonable presumption is that Congress in imposing this tax acted with full knowledge of all the facts respecting the subject-matter thereof, and because of such facts imposed the tax in question. Now, what facts did Congress have before it respecting oleomargarine of which this court will take judicial notice; and as bearing

upon that question, of what facts will this court take judicial notice?

In *Brown* v. *Piper* (91 U. S., 42, 43) the court said that "the courts of the United States take judicial notice of the laws and jurisprudence of the several States in which they exercise jurisdiction;" and that "courts will take notice of whatever is generally known within the limits of their jurisdiction." And this rule was adhered to in *Brown* v. *Spillman* (155 U. S., 670). In *Mills* v. *Green* (159 U. S., 657) it is said that "the lower courts of the United States, and this court, on appeal from their decisions, take judicial notice of the constitution and public laws of each State of the Union." In *Bank of Kentucky* v. *Adams Express Co.* (93 U. S., 185) the court says it can not close its eyes to the well-known course of business in the country. So in *Nicol* v. *Ames* (173 U. S., 517) the court says it has "the right to consider facts without particular proof of them, which are universally recognized and which relate to the common and ordinary way of doing business throughout the country." In *The Delaware* (161 U. S., 472) the court, in substance, says that it will take judicial notice of that which is a part of the history of the times. In *United States* v. *Rio Grande Dam and Irrigation Co.* (174 U. S., 698) the court says that it will take judicial notice of that which is a matter of common knowledge within its jurisdiction. In *Bank of Augusta* v. *Earle* (13 Pet., 590, 591) the

court takes judicial notice of general usages of commerce and trade.

In *New York Indians* v. *United States* (170 U. S., 32), with respect to matters of which it will take judicial notice, the court, speaking by Mr. Justice Brown, says:

> While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, which were not called to its attention, or other similar matters of judicial cognizance.

See also 1 Greenleaf on Evidence, sections 5 and 6.

So that the court will not explore the motives of legislators as drawn from debates, but will notice well-known facts and situations in the life and business of the times.

It becomes important here to point out the well known facts, not only for the purpose of showing the fundamental state of affairs upon which the will of Congress acted and that Congress was justified in laying the discriminating tax upon the colored article, but also as showing that, because of the character and magnitude of the traffic in that article, Congress might properly impose the heavy tax upon it not only for direct revenue thereon but also for the purpose of preventing frauds upon the revenue in the collection of the tax upon the uncolored article. In short, opening the

door *pro arguendo* to facts properly excluded by the courts below, the Government contends that the discriminating tax of 10 cents per pound upon the colored oleomargarine can be sustained upon two grounds: (1) That the classification is proper because the uncolored article can only be sold for what it really is, and at its true value; that the sole purpose or the main purpose of coloring oleomargarine is to make it so closely resemble butter (an article of double its value) that it may very readily be sold as and for butter, and at double the price that can be obtained for it when sold for what it really is; that even if it is candidly *sold* for what it really is, it is likely to be unwittingly *consumed* for the genuine article which it resembles. Thus the line is drawn between legitimate commerce and a trade which, even if recognized, is at least disingenuous and doubtful. (2) Congress having full knowledge of the character and magnitude of the trade in butter and its imitations, and of the nature and incidents of the business in colored oleomargarine, may, as part of its entire revenue scheme and incidentally to detect and prevent fraud in collection, distinguish the colored and uncolored articles and lay a heavy tax upon the colored article, inevitably imitative and fraudulent in effect.

(2) Further as to the propriety of the classification.

It becomes necessary, then, to call attention to the magnitude of the traffic in the colored article

and to its character, and, as showing that fact, to the prohibitions and restrictions placed by the States upon the sale of the article.

The court has said that it will take judicial notice of the laws and jurisprudence of the States of the Union; and the court is consequently presumed to know that forty-two States and Territories of the Union have passed stringent laws requiring the branding of all oleomargarine (whether colored or uncolored) manufactured or sold therein, so as to advise all purchasers of its true character, and requiring dealers engaged in selling it to give due notice to their customers to that effect; and requiring hotels and restaurants to advise their patrons in case they use oleomargarine as a substitute for butter. The court is also presumed to know that twenty-nine States[a] of this Union have absolutely prohibited the manufacture and sale (in one[b] instance the sale alone) of all oleomargarine colored so as to resemble butter; and heavy penalties are provided by the forty-two States and Territories for any violation of these laws. In addition to this, most of the remaining States have laws prohibiting the false branding of any article of food, which would prohibit the selling of oleomargarine for anything other than it really is.

[a] Alabama, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Dakota, Utah, Virginia, Washington, West Virginia, and Wisconsin.

[b] Missouri, while permitting the manufacture, prohibits the sale of colored oleomargarine.

West Virginia requires all oleomargarine to be colored pink.

For the information of the court a condensed summary of the laws of the States and Territories regulating the manufacture and sale of oleomargarine is printed as an appendix to this brief and marked "Appendix B."

Congress must be presumed to have been aware of all these laws, and of all the incidents of the trade upon which they operated, supply, demand, use, profits—profits obviously very great and properly enough burdened accordingly. Congress legislated, no doubt, and it was entirely right for Congress so to legislate, in the light of these widespread laws and the universal situation which they revealed.

Is there not a sufficient distinction between uncolored oleomargarine which can only be sold for what it really is, at, perhaps, from 10 to 12 cents per pound, and the same article disguised by means of a little coloring matter so as to resemble and to be sold for the best creamery butter at from 20 to 24 cents per pound, to justify Congress in classifying the two forms of the article for purposes of taxation? The dealers say Congress can not make this distinction, this classification for taxation. But they concede the distinction for purposes of sale while denying it for purposes of taxation. In their testimony and in the briefs of their counsel they recognize a distinction. They complain that they can not sell the uncolored article as a substitute for butter. It is not unfair

to suggest that the real complaint is that unlike colored oleomargarine it can not be sold as and for butter. But they say the colored article they can sell as a *substitute* for creamery butter. Now, however it may be sold, it is notoriously used and consumed *as and for* creamery butter.

A line of cases in this court and in lower Federal courts deals with oleomargarine under State laws, and with certain aspects of this law presenting the real and essential nature of the business. We cite the cases of *Powell* v. *Penna.*, 127 U. S., 678; *Plumley* v. *Mass.*, 155 U. S., 461; *Schollenberger* v. *Penna.*, 171 U. S., 1; *Collins* v. *New Hampshire*, 171 U. S., 30; *Capital City Dairy Co.* v. *Ohio*, 183 U. S., 238; *In re Kollock*, 165 U. S., 526; *Wilkins* v. *United States*, 96 F. R., 837; *United States* v. *Dougherty*, 101 F. R., 439; *Dougherty* v. *United States*, 108 F. R., 56.

In the decisions of this court cited the court recognizes a distinction based upon the character of the article and the traffic by declaring that a State may prohibit the use of a counterfeit article. Thus in the *Plumley case* the court, speaking by Mr. Justice Harlan, says (p. 478):

> We are of the opinion that it is within the power of a State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of

> which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy.

It is quite certain that if the State of Massachusetts had attempted arbitrarily and without good reason to exclude a legitimate and meritorious article of commerce (meritorious, because not seeking or not likely to deceive), this court would not have sustained the law.

There is, then, a clear distinction, a classification or difference recognized by the States in their legislation. The correctness of that distinction has been recognized by this court. So, Congress in imposing the different rates of tax does not arbitrarily create the classification; it finds it already existing, created by the States, recognized by the courts, and lays the tax accordingly.

(3) The tax may be sustained as a means to prevent fraud in the collection of the tax laid upon the legitimate article.

It is a well-established rule that this court will not declare a tax invalid if it can be sustained upon any ground; and, further, that to prevent fraud in the collection of a tax Congress may provide such safeguards as it deems proper. This tax of 10 cents per pound upon the colored article may also be sustained upon the theory that it is a regulation declared by Congress as a means of preventing fraud in the collection of the tax imposed upon the legitimate article, uncolored oleomargarine.

The court may not deem it any more proper to inspect the debates for information as to the purpose and conception of legislators in urging a law than as to their individual opinions as to its intention, or meaning, or effect. Therefore, I submit, with reserve, the suggestion that the debates show a belief or conviction that the high tax on colored oleomargarine was necessary and was justified to prevent fraud in the collection of the tax upon the uncolored article; that is, the genuine variety, as it were, of oleomargarine. The argument is about as follows: The tax of 10 cents per pound imposed upon the imitative article is a regulatory tax legitimately imposed in aid of the collection of the tax levied upon the genuine article; that is, uncolored oleomargarine. There is no tax upon pure butter, and if oleomargarine is so made and colored as not to be distinguishable from butter it might evade the tax imposed upon it. When an article taxed is made to counterfeit an article not subject to tax, Congress may put upon it a higher tax in order to secure identification of the genuine article as against the fraud or counterfeit, which, if successful, evades the tax intended to be imposed upon the genuine article. The degree of the regulatory tax upon the counterfeit or imitation is for Congress, having due regard for the welfare of the people, to determine. (Cong. Rec., 57th Cong., 1st sess.; remarks by Senator Hoar, pp. 3280–3282; Senator Spooner, pp. 3505–3506.)

Again, the law involved here imposes license fees upon the manufacturer and the retail dealer. In aid of the collection of these fees, Congress has the power to impose an added tax upon the counterfeit (I use that term in this brief not as an animadversion, but as conveniently describing the fact), for the reason that, if only the counterfeit passes into the hands of the retail dealer, it will be difficult to tell, without a scientific test, whether the colored article is butter or oleomargarine, thus rendering the tax more doubtful of collection. So, we repeat, that Congress, when taxing an article, has the power to compel the manufacturer of that article to disclose what he is doing; and that if he so disguises the article taxed as to make it possible for an evil disposition readily to escape taxation, Congress may prevent such chance of fraud either by the imposition of a heavy tax, or by such other regulations as it deems suitable to accomplish the purpose.

It rests with Congress to say what means it will adopt to accomplish this purpose.

In the case of *United States* v. *132 Packages of Spirituous Liquors* (76 Fed. Rep., 364) there was involved the validity and construction of section 3449 of the Revised Statutes which prohibits the removing, shipping, or transporting of any spirituous or fermented liquors under any other than the proper name or brand known to the trade. It was contended that this was merely a trade-mark

regulation and beyond the power of Congress, but the court held otherwise, Caldwell, circuit judge, saying (p. 367):

> The contention of the learned counsel for the claimant that this section is nothing but a trade-mark regulation is not tenable. It is one of the numerous regulations prescribed by the internal-revenue laws intended to prevent frauds on the revenue in the manufacture, removal, shipment, and sale of distilled spirits and other liquors and to aid in the detection of such frauds. The regulations for this purpose are very extensive and extremely minute. They embrace every step in connection with the manufacture and handling of spirits, from the introduction of the raw material into the distillery down to the rectification of the product, and its removal, shipment, and sale. * * * Before a court would be authorized to hold an act of Congress obsolete and inoperative, it would have to appear conclusively that it was *totally inoperative for any lawful or useful purpose*. When the statute relates to a subject-matter within the constitutional competency of Congress to legislate upon, the presumption is that it serves a useful purpose. * * * The section is *none the less a revenue regulation* because its enforcement may tend to discourage the piracy of trade-marks, and prevent frauds upon those who consume the contents of the packages. These are mere incidents of the statute, and not its primary object.

> Congress has an undoubted right to legislate to prevent frauds upon the public revenue, and the validity of such legislation is not affected by the fact that it incidentally tends to the discovery or suppression of private frauds.

In *Nicol* v. *Ames* (*ut supra*) the court said: "Other means [than a certain memorandum required by law] might have been resorted to for the same purpose. Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress and its decision must be conclusive in that respect." To assure the revenue purpose, in other words; to make certain the collection of the tax.

So in *Felsenheld* v. *United States* (186 U. S., 126) the court sustained the power of Congress to prohibit the placing of anything whatever on or inside any package of tobacco. It was claimed that Congress had no power to do this; that it was an attempt to exercise a police power, and that Congress could not pass any provision except such as were helpful to the collection of the tax. The court, speaking by Mr. Justice Brewer, answers this in these words (p. 131):

> Now the contention is that the courts may supervise this system of rules and regulations, and if they find a provision which, in their judgment, in no way secures or facilitates the proper collection of the tax they may strike it down as something beyond the power of Congress. It is said that

the only matter in which the National Government is concerned is the tax; that it is in no manner responsible for what goes into the commercial world covered by its stamp; that it has no police power, no duty of caring for the health or safety of citizens or others who buy articles upon which its stamp is placed; that it does not guarantee either quantity or quality, and, in short, that its power is limited to such provisions as are essential or helpful in the collection of the tax.

It may be conceded that the Government's stamp is not a guaranty of quantity or quality, and that no responsibility attaches to it, although the manufacturer puts into the packages less than the specified quantity of goods or goods of inferior quality. But does it follow that the Government has no power to prescribe that the packages which it stamps, upon which it collects a tax, shall contain the very articles and only the articles which it purports to tax and which its stamp certifies that it has taxed? Take the matter of tobacco; can it be that a manufacturer may fill packages purporting to be of tobacco with half tobacco and half sawdust, and the Government can pass no valid statute to prevent it? If the manufacturer is willing to pay a full tobacco tax on this package, half tobacco and half sawdust, must the Government take the money, affix its stamp,and thus in effect certify that the contents are that which it has imposed a tax upon? Manufactured goods are not

necessarily sold in this country, but may be shipped to other countries and sold there, and can it be that the stamp of this Government is absolutely worthless as an assurance that that which is within the package is the article which the Government purports to have taxed? It is one thing to say that the Government's stamp is not a guarantee of either quantity or quality, and that no liability attaches to it if the manufacturer imposes upon his customers by inserting something which is not that which is stamped, but it is a very different thing to hold that the Government is absolutely powerless to legislate so as to protect the customer and prevent the manufacturer from putting within the package anything but the article which it proposes to tax. Whatever courts may rule as to the constitutional limits of the power of Congress, the great majority of people here and elsewhere will believe in and rely upon the truthfulness of a certificate made by the Government, and will be shocked to be told that it means nothing to them, but only money to the Government.

It seems to us that, in the rules and regulations for the manufacture and handling of goods which are subjected to an internal-revenue tax, *Congress may prescribe any rule or regulation which is not in itself unreasonable.*

May not the Government legislate to this end by the amount of a certain tax as well as by prescribing certain incidental regulations?

The court is so familiar with the various provisions enacted for the purpose of preventing frauds in the collection of the revenue upon liquors and tobacco that it is not necessary to mention them. But we call the attention of the court to the act of March 3, 1897 (29 Stat., 626), providing for the bottling of spirits in bond, as showing the control Congress believes it has over articles which it taxes, which implies something more than a naked power to tax; and as going along with that power a right to say that its stamp denoting the payment of a tax upon a certain article, can not be used upon an article different in character, quality, or amount, from that denoted by the tax.

It is pertinent to say here that I perceive no reason for any fundamental distinction between the cases of liquors and tobacco and that of oleomargarine. All three invoke the taxing power and rest under the burden of heavy taxes. Each presents a certain special situation, common throughout the country and notorious, and upon such well-known situations Congress has acted. Each presents, as moving the taxing power, certain features which involve considerations of general welfare. In each the traffic, while recognized as commerce, rests under a certain ban, a different ban in each case, but referable to the same general principles. The idea of an article, the consumption of which is to be watched and regulated on grounds of general welfare founded in physical and mental hygiene and morals, is

present in the first two cases. The object of revenue and the notions of evasion, counterfeit, and the prevention of fraud on the revenue are common to all. The similarity of the two sets of laws was recognized in *In re Kollock*.

The case of *United States* v. *Singer* (15 Wall., 111) is similar, in some respects, to the case at bar.

In delivering the opinion of the court, Mr. Justice Field, after referring to many of the sections and provisions of the law involved, says (p. 120):

> The system thus adopted was designed to prevent the secret production of spirits and consequent evasion of the Government tax; and it seems well suited to accomplish this purpose. It at least reduces the limits within which fraud can be practiced to 20 per cent of the capacity of the distillery. In view of the enormous frauds previously practiced upon the Government in rendering accounts, this system can not be justly charged with unnecessary harshness. Everyone is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing capacity of his distillery. If he fail under these circumstances to produce the amount for which by the law he will in any event be taxed if he undertake to distill at all, he is not entitled to much consideration.

In *United States* v. *Three Packages of Distilled Spirits* (recently decided; United States district court, eastern district of Missouri), reported in

Treasury Decisions of October 1, 1903, there was involved the construction of section 3455, Revised Statutes, which makes it unlawful to sell any empty barrel or other package which has contained any article or product upon which an internal-revenue tax has been paid, without first destroying the stamps thereon, etc. In discussing the reasons for the statute, Judge Amidon says:

> It is said in many of the decisions to which reference has already been made that the primary object of the internal-revenue law is to prevent frauds upon the revenue. That is no doubt true, but what will best accomplish that purpose is a matter for legislative, not judicial, discretion. In the judgment of Congress, there are many classes of acts which ought to be prohibited because of the possibility of their being done for the purpose of defrauding the revenue.

If it is within the power of Congress to say what regulations are necessary or proper for the purpose of preventing frauds upon any branch of its revenue, then may it not impose a heavier tax upon an article, itself constituting the means by which a fraud may be accomplished, rather than by the adoption of some particular system of regulations, as in the case of distilled liquors?

(4) The tax is not prohibitive of the manufacture and sale of colored oleomargarine.

Reduced to its last analysis, the argument for the dealers is that the tax is unconstitutional because prohibitive of manufacture and sale.

As to the allied point that Congress was interfering with the States, I say again that the act of 1902 shows upon its face that Congress was exercising the taxing power alone. This is apparent from a reading of the whole act, and especially section 5, which relates to process butter. In that section Congress exercises its power to regulate interstate or foreign commerce. That section confers upon the Secretary of Agriculture the power of inspection, and prohibits the entering into interstate (not State) commerce of any butter not bearing the inspection brands of that officer. But nowhere in the sections relating to oleomargarine is any such power, or any power conferred upon that officer, except his function as a member of the board of review provided for by section 14 of the act of 1886. In short, it is a simple taxing law, and was so declared by this court in *In re Kollock* (165 U. S., 526), as to its main and primary purpose.

The argument that the tax is prohibitive of the manufacture and sale of colored oleomargarine is to be considered with reference to the facts about oleomargarine, and on these we again invoke the doctrine of judicial notice and the opinions of this court.

In *Schollenberger* v. *Penna.* (171 U. S., 1) the court discusses the character of oleomargarine, and refers to the reports of the Secretary of the Treasury for the purpose of showing the magnitude of the traffic in that article. Similar in char-

acter to the reports last mentioned, and entitled to the same notice, are the reports of the Twelfth Federal Census, taken in the year 1900. The reports of that census contain statistics which show not only the quantity of butter products and of oleomargarine produced during that year, but also, approximately, the cost and value of the manufactured products. These tables are presumed to contain as accurate information as it is possible to obtain, and to these tables we respectfully call the court's attention.

In volume 9, Manufactures, part 3, on pages 433 to 459, may be found the statistics relating to butter. The following is a summary of the facts there stated respecting the manufacture and cost of butter for the census year of 1900 (p. 437):

Butter made on farms, pounds	1,071,745,127
Butter made in factory creameries, pounds	420,126,546
Butter made in urban dairies, pounds	827,470
Total pounds of butter made	1,492,699,143
Total value of butter made, at 18 cents	$268,685,845

The court will keep in mind the fact that the average value of butter of all grades is fixed at 18 cents per pound. To this fact attention will again be called later on.

On page 435 of the volume is to be found a table (4) showing the number of creameries or butter factories in operation. This table shows that there were in operation in 1900, 5,275 creameries making butter only, and 583 factories making both butter and cheese—a total of 5,858 creameries

engaged in making butter. These creameries were distributed throughout the various States of the United States, as shown by the table, and produced the total of 420,954,016 pounds of butter reported as made in factory creameries and country dairies. On pages 440 and 441 we are given the method of packing, which to a certain extent affects the price, and the average prices received for the product throughout the various States. Thus on page 441 it is stated that the average price received for all butter, as reported by the creameries, was nearly 20.1 cents per pound. The average price for that packed solid, or in tubs, was 19.4 cents; for that packed in rolls, 22.1 cents per pound. The average price received in Connecticut for prints was 24.6 cents; in Massachusetts, 23.5 cents; Pennsylvania, 23.4 cents; in California, rolls, 22.3 cents. The average for butter packed in tubs at Iowa, Minnesota, and Wisconsin creameries was 19 cents; Nebraska, 18 cents, and Kansas, 17 cents. It is this creamery butter that more largely comes into competition with the colored oleomargarine than the butter made on the farm. The average price then on these vast transactions is fixed at 18 cents.

Similar facts as to oleomargarine will be found on pages 517 to 525 of the same volume of the Census Reports. In 1900 there were 24 factories engaged in the manufacture of imitation butter, or oleomargarine; in 1902, 36; and at the present time there are 28, located as follows (the facts

for the periods subsequent to the census tabulation are furnished by the Commissioner of Internal-Revenue from his office records):

States.	Fiscal year ended June 30, 1902.	Present fiscal year, July, 1903.
Colorado	1	1
Rhode Island	5	4
Illinois	10	6
Indiana	3	3
Kansas	3	4
Kentucky	2	0
District of Columbia	1	1
Maryland	1	0
Missouri	1	1
Ohio	4	3
Pennsylvania	1	1
Texas	2	2
New Jersey	2	2
Total	36	28

Upon page 519 of the Census Report, we find this statement:

> The value of the 104,633,214 pounds of oleomargarine (made in 1900) was $12,286,357, an average of 11.7 cents per pound. *This amount represents the value at the factory, packed and ready for shipment, and includes the internal-revenue tax of 2 cents a pound*, which must be paid on withdrawal for sale.

Deducting the internal-revenue tax of 2 cents per pound would give the product a value of 9.7 cents per pound at the factory, which seems to

include, as indicated below, the manufacturers' profit.

On page 518 of the report is to be found the following table, showing the quantity and cost of the materials used in making the product, with the value of the product for that year:

TABLE 3.—*Materials and products: 1900.*

Items.	Quantity.	Cost of materials.	Value of products.
Materials:	*Pounds.*		
Total	114,748,633	87,639,501	
Milk and cream	23,684,395	579,068	
Oleo oil	33,724,621	2,744,235	
Neutral lard	37,651,741	2,976,870	
Cotton-seed oil	11,818,921	567,790	
Butter	396,956	61,176	
Salt	6,962,233	58,887	
Color	204,418	32,078	
Sugar	137,842	7,084	
Glucose	32,965	494	
Stearin and oleo stock	134,541	4,320	
Fuel and rent of power and heat		49,855	
Mill supplies		5,745	
All other materials		501,107	
Freight		50,792	
Products:			
Total	104,633,214		$12,499,81
Oleomargarine	104,633,214		12,286,35
All other products			213,45

It will be noticed that the cost of the materials set out in this table, including fuel, rent, mill supplies, other materials, and freight, is a little less than 7⅓ cents for each pound of oleomargarine

manufactured. The average cost per pound of the different ingredients used in the manufacture of the article was as follows:

	Cents per pound.
Milk and cream, about	2.45
Oleo oil, about	8.20
Neutral lard, about	8.00
Cotton-seed oil, about	4.75
Butter, about	15.50
Salt, about	.85
Color, about	15.50
Sugar, about	5.13
Glucose, about	1.50
Stearin and oleo stock, about	3.21

The court will not fail to observe that the disguises (butter and color) constitute the most expensive ingredients that enter into the composition of oleomargarine.

So, if we add to the average value given oleomargarine in 1900, 9.7 cents, the revenue stamp of 10 cents, it will make a value of 19.7 cents per pound, as against an average value of 18 cents for butter of all kinds, of 20.1 cents for creamery butter packed in prints, and 19.4 cents for creamery butter packed in tubs or packages. And it is this creamery butter, rather than butter made upon the farm, that colored oleomargarine more largely competes with. A large portion of the butter from the farm finds its market in the near-by villages and cities, reaching the consumer through the grocers and small dealers; but naturally much of it also comes in direct competition with the counterfeit article. The creamery product, as a rule,

seeks the larger markets. As the court will notice, the oleomargarine is mostly manufactured at the large cities, with a market close at hand, while the creamery product is manufactured all over the country, farther removed from its market, and consequently is subjected to more expense in reaching it. The apparent fact is that the taxing of the colored article at the rate of 10 cents per pound makes its cost just about equal to the cost of the butter it imitates.

I have just above called attention to the fact that butter was by far the most expensive ingredient used in the manufacture of oleomargarine. To better illustrate the increase in the cost of manufacture by reason of the use of a large percentage of butter, I print herewith the three formulas for the manufacture of oleomargarine, found on page 521 of the volume of the Census Report above quoted from:

Formula 1.—Cheap grade.

	Pounds.
Oleo oil	495
Neutral lard	265
Cotton-seed oil	315
Milk	255
Salt	120
Color	1¼
Total	1,451¼

will produce from 1,265 to 1,300 pounds of oleomargarine.

Formula 2.—Medium high grade.

	Pounds.
Oleo oil	315
Neutral lard	500
Cream	280
Milk	280
Salt	120
Color	1½
Total	1,496½

will produce from 1,050 to 1,080 pounds of oleomargarine.

Formula 3.—high grade.

	Pounds.
Oleo oil	100
Neutral lard	130
Butter	95
Salt	32
Color	½
Total	357½

will produce about 352 pounds of oleomargarine.

"Practically all the oleomargarine manufactured in the United States is made by the simple process of churning a melted mixture of oleo oil and neutral lard with milk, cream, or melted butter to give it the butter flavor, and coloring matter to give it any desired shade of yellow in semblance of butter. In the cheap grades cotton-seed oil is often substituted for a portion of oleo oil and neutral lard, but never to the total exclusion of either. After the churning process the whole is salted and put upon the market in a variety of forms [in respect to shape, packing, etc.], as demanded by the various classes of consumers."

Turning to the records in these cases, what evidence do we find upon the cost of the article and the relative price of butter and oleomargarine in the Chicago market? As the evidence upon this point is practically the same in the *Cliff*, *Schick*, and *Broadwell* cases, it will be sufficient to refer to the evidence in the *Cliff* case.

Dadie, the secretary of the Moxley Company (the company which made the oleomargarine in three cases just named), testified (Cliff R., p. 19) that he knows the company can not make and sell the colored article in competition with butter and pay the 10-cent tax. He says that in December last butter sold for 29 cents per pound, but that was an extremely high price. He said in view of that fact his company was able to manufacture and sell the colored article at 24 cents per pound, 5 cents below the price of butter. This doubtless was at a fair profit to the manufacturer. He further states that the average price for butter the year around is approximately 25 cents per pound. On page 20 he states that in January of the present year they were selling the uncolored oleomargarine at 12½ cents per pound, and, it is to be presumed, at a fair profit.

On cross-examination, Izard, a restaurant keeper and a witness for the dealers, testified (R., p. 18) that he could not now get good butter cheaper than he could get colored oleomargarine; that good butter cost on an average about 2 cents more per pound

than colored oleomargarine. In view of the testimony of the dealers' own witnesses respecting the relative cost of butter and of oleomargarine, and of the facts contained in the Census Report quoted from, it can not be contended, with any force or reality, that the tax is prohibitive of the sale of the counterfeit article. An analysis of Dadie's testimony (*ut supra*) shows by the clearest inferences that the tax has simply caused a readjustment of demand and markets; that the oleomargarine business is not destroyed; and that already, after the check caused by the tax, the industry and trade in the uncolored article are being reestablished and are growing. It may be true that the articles used in the manufacture of oleomargarine have increased in cost; but so has butter correspondingly, so that the relative cost appears to remain the same.

It is claimed that the tax is prohibitive because the quantity of the colored article sold since the taking effect of the present law has fallen off so that but comparatively small quantities have been sold. That does not prove the claim. The testimony of the witnesses for the dealers is that good butter costs on an average 2 cents more per pound than colored oleomargarine.

This fact alone shows a normal margin of profit and a sufficient field for oleomargarine in competition with butter, even under the present tax. Now, why is it that, since oleomargarine is claimed to be at least as sweet, pure, and wholesome as

butter, and can be sold under present conditions in competition with butter, the people who are said to wish it, or even prefer it, are not now willing to buy it at 2 cents per pound less than butter, when they were willing, as claimed, under the 2-cent tax, to pay butter prices for it? This seems rather strange, and yet is what the dealers' claim and testimony reduces to. Is the apparent dilemma explained by regarding the distinction between the small dealers or users (like hotel people) on the one hand and the actual *consumer* on the other? The latter probably seldom knew what he was buying and eating, and it may be that one effect of this act is to protect him, to enable him to know more certainly what he is buying, and in that way affect the undue profits and, in consequence, the market demand.

The witness Dadie says (Schick Rec., p. 17, 18) that the uncolored article put out by them is now sold to the poorer people and, so far as he can ascertain, it is displacing lard and is used for cooking purposes. He further says (p. 18) that lard was selling for 10¼ cents per pound and uncolored oleomargarine at 12½ cents, and that the people were buying the latter for cooking in preference to lard. It is strange that people will pay more for this superior article for cooking purposes than for lard, and yet while formerly preferring it to butter and paying butter prices, they will not purchase it now although it can be had at a less price than butter.

What effect did the law have upon the production of oleomargarine? For the year ending June 30, 1902, the total production of oleomargarine was 123,133,853 pounds. For the year ending June 30, 1903 (under the present law), the total production amounted to 71,237,438 pounds. Of this amount 5,112 pounds paid the tax under the old law at 2 cents per pound; 2,719,422 pounds (colored) paid the tax of 10 cents; 68,490,992 pounds paid the tax of one-fourth cent, and 21,915 pounds (imported) paid the tax of 15 cents. This information is taken from the reports of the Commissioner of Internal Revenue for these years. It is true that there is a large falling off in production. A part of the loss may properly be attributable to the time required to adjust matters to new conditions.

The following table shows the number of pounds produced during the months of July, August, and September of the present year, as appears from the records in the office of the Commissioner of Internal Revenue:

1903.	Uncolored.	Colored.
July	3,268,805	284,828
August	3,502,618	285,581
September	4,268,993	281,053
Total	11,040,416	851,462

Although this information was furnished informally, there can be no valid objection to its relevancy or accuracy.

Can it be said, with any degree of certainty, what per cent of this loss was a loss of legitimate trade and business? It must be remembered that prior to the change in the tax practically all oleomargarine was colored yellow. (Dadie, Cliff R., p. 17.) Now, in view of the fact that at the time of the passage of this law about thirty of the States had absolutely prohibited the manufacture and sale of oleomargarine colored in imitation of butter; the fact that nearly all of the remaining States had stringent laws requiring the branding of both the colored and the uncolored article; the fact (as shown by the decisions of the courts of the several States and the reports of the officers charged with the enforcement of State laws) that great frauds were being perpetrated in selling the colored product as and for butter; and the further fact that by the passage of this law and the promulgation of the regulations thereunder, it became exceedingly difficult to continue these frauds without detection, is it not a reasonable presumption that the falling off in production, the alleged injury to the business, is indicative of the amount of the colored article that theretofore had been fraudulently sold as and for butter? If the effect of this law be to put a stop to the practice of these frauds, can offending parties for that reason alone come into this court and be heard to complain? I do not say defendants have so offended, but the business in general has been long open to suspicion. And if offenders can not complain that

the fraudulent side of the business has been checked as one of the results of the tax, what right granted by the Constitution of the United States has been impaired? The right to practice a fraud upon one's fellow men! Very likely innocent manufacturers and dealers suffer. But this court said in the *Plumley case* that "the Constitution of the United States does not secure to anyone the privilege of defrauding the public." Is it too much to add that the Constitution does not secure the opportunity to defraud nor intend to leave an open door to fraud which he may enter who is so inclined? I venture to say that in the end the honest side of the trade, in its proper development, will approve the effect of this law as limiting the opportunities for fraud, in harmony with and not counter to the great current of State policy and legislation.

These cases arose in the States of Illinois and Ohio. What rights, privileges, or immunities guaranteed by those States have been infringed? None whatever. On the contrary, the acts of these parties were, at the time of their commission, made criminal by the laws of the States in which they were committed. The act of Illinois of June 14, 1897, in force at the time of the commission of the offenses here involved, reads as follows:

> Every article made from other than pure milk or cream is declared to be imitation butter.

> No person shall coat, powder, or color with annatto, or any coloring matter whatever, any substance designed as a substitute for butter, whereby such substitute or product so colored or compounded shall be made to resemble butter, or the product of the dairy.
>
> No person shall combine any animal fat or vegetable oil or other substance with butter or combined therewith or with animal fat or vegetable oil, or combination of the two, or with either one, any other substance or substances for the purpose or with the effect of imparting thereto a yellow color or any shade of yellow so that such substitute shall resemble yellow, or any shade of genuine yellow butter, nor introduce any such coloring matter or such substance or substances into any of the articles of which the same is composed. (Laws of 1897, p. 3.)

The act further makes it unlawful to produce or manufacture, or sell, prepare for sale, or offer for sale, any imitation butter made in violation of the act, whether produced in the State or not, and imposes a heavy penalty for any violation thereof.

The Ohio law, in force since 1894, provides as follows:

> No person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any oleomargarine which contains any methyl orange, butter yellow, annatto, analine dye, or any other coloring matter. (Act of May 16, 1894; 91 Ohio Laws, 274.)

In *State ex rel.* v. *Capital City Dairy Co.* (62 Ohio St., 350), arising under the State law just quoted, practically the same complaint was made by an oleomargarine manufacturer that is made here—the denial of an alleged natural right to manufacture the article and to sell it in such form as it chose.

The proceeding was one in *quo warranto* to revoke the charter of the corporation for the repeated violation of the law above quoted. The court, after saying (p. 359) that the evidence compelled the conclusion that the acts charged had been committed by the defendant, and that their frequency warranted the conclusion that they were committed willfully and with the intent to disregard the statute and to defy the officers whose duty it was to enforce the law, held that the law did not violate any right granted to the manufacturer by the constitution of that State; further stating that the difference between the price at which butter may be manufactured and sold and that at which oleomargarine may be afforded, is so large that the temptation to impose upon the public is too great to be resisted; and that, therefore, because of the manufacture of the article in a way calculated to deceive and to impose a fraud upon the public, the State had the right to pass the law in question. So there is nothing in their claim that, in imposing this tax, Congress is denying or interfering with a right granted them by the constitutions and laws of their respective

States. *The Capital City Dairy* case reached this court, and the decision of the supreme court of Ohio was sustained (183 U. S., 238).

In other words, since we have entered upon the underlying considerations, and frankly discussed the collateral effect of this tax as imposing a restriction, but not an undue restriction, upon business, it is proper to say, and it is manifest, that on the side of alleged interference with State powers, the Federal act is not in conflict, but on the other hand operates, so far as it operates outside the revenue field, to reinforce and support the trend of State legislation.

To return to the question whether the tax is prohibitive—if there be a legitimate demand for the colored article as and for what it really is, does the mere fact that the tax imposed requires the article to be sold at a price equal to that at which butter is sold, render the tax prohibitive? Will not the public generally, if they desire the article, pay the price asked for it, especially when the increase in price from the price under the former law is so trifling? To say that the public will not do this is to concede that the article can not stand upon its merits, but must be sold, and fraudulently sold, in the disguise of and as and for butter.

For, when there is a real public demand for an article, uncontrolled by inducements and irrespective of guises and pretense, the public will have it, and the question of cost or tax cuts but little figure.

Thus it costs but a few cents per gallon to manufacture whisky. Upon that article the Government imposes a tax of $1.10 per gallon; but because of that fact does the tax render its manufacture prohibitive? Certainly not. On the contrary there is a strong demand for it, because the public demands whisky. So, too, with tobacco; Congress in the act of 1898 increased the tax from 6 to 12 cents per pound, but the demand for it did not diminish. So with beer, and many other articles. We import many articles, upon which heavy duties are imposed, which we manufacture at a less cost than the imported article can be sold for; but while that may check the sale of the article, it does not thereby cause the duty to be regarded as prohibitive. Some of the compound taxes on foreign imports amount to 100 per cent or more.

(5) Further on the validity of the classification; proper substitutes, and improper imitations.

An article may be used as a substitute for another without being made so closely in imitation of it that it is not possible to tell the original from the substitute. And what is the purpose of the close imitation? The natural inference is that the intention is to dispose of it as being that which it seeks to imitate. And, as a matter of fact, is it not the purpose in coloring oleomargarine to make it so closely resemble butter that it may be sold as and for butter? This fact is so fully within common knowledge that the court may properly take

judicial notice of it. In considering State laws, the court has already done so. Will the claim put forth that the public demands the colored article and will not use the uncolored bear examination? Can that possibly be true of the vast majority of actual consumers?

A good illustration of the difference between a substitute for an article and an imitation of it exists with respect to coffee. There is upon the market to-day a substitute for coffee, made of cereals, put up in a distinctive form, which, when prepared, looks like and tastes like coffee. This article is sold upon its merits, and irrespective of the price for which the real coffee is sold. To the extent that its use diminishes the use of the real coffee it may be said to come in competition with it. While it is a substitute for, it can not strictly be said that it is an imitation of coffee. No one can be deceived into buying it for coffee.

There is also upon the market to-day an imitation coffee, made of parched peas, chicory, beans, molasses, and a few other kindred products. This composition is ground, mixed, and pressed into molds, so that when it reappears it comes forth in the semblance of and is a good counterfeit of the real coffee berry. That is an imitation coffee. The result, if not the purpose, of imitating the berry of the real article is obviously the same as in coloring oleomargarine—it may deceive the public—or, as was said by Mr. Justice Harlan in

Plumley v. *Massachusetts*, it may *cheat* the general public into purchasing that which they may not intend to buy.

Now suppose that Congress should pass a law imposing a tax of 10 cents per pound upon such "coffee" when made in imitation of the real berry, and one-fourth cent per pound when made in the form of a round berry; and suppose the law were contested on the ground that the tax of 10 cents was prohibitive; and the manufacturer were to claim he could not sell the coffee in the round berry because the public demanded the coffee in the form of the real article, saying to him, "take back your parched peas, we will not have them" (as in the Cliff case, Rec., p. 14); "we are willing to pay coffee prices for the article when put up in the form of the real article, but otherwise we will not use it." Would that claim be believed; or is there a sentimental difference because butter or oleomargarine appears on the table and coffee or its imitation is ground up to make an indistinguishable liquid? So we say, that if colored oleomargarine has the peculiar standing as a legitimate article of commerce, which is claimed for it by the dealers, the mere fact of the imposition of the tax would only reduce, in slight degree, the demand for the article.

On the other hand, does not the fact that the present law and the regulations under it make it next to impossible to continue the business on its

counterfeiting and illegitimate side, furnish us the true solution of the reason for the falling off in the sales of colored oleomargarine? If one of the incidents and effects of the law be to check fraud, I am confident this court will not be diligent to find reasons antagonistic to its well-settled judgments for sustaining the complaint that the law is void.

Counsel for *McCray* attempts to show (brief, p. 12) that this tax was not a revenue measure, because at the time the tax was changed we had an overflowing treasury and Congress was then engaged in reducing the war taxes. It is true that Congress was taking the burdens off of a great number of articles and readjusting taxes, having due regard for the general welfare of the people. But the tax upon oleomargarine was imposed in 1886, and was not therefore a war-revenue tax. And further, Congress did reduce the tax upon oleomargarine from 2 cents to one-fourth cent per pound when put up in such form as to show its true character; but having regard to the great profits then made in selling colored oleomargarine, it shifted the burden of the tax to that form of the article and increased it. This Congress, applying its judgment and discretion to the whole field and the different elements involved, had a perfect right to do. The law was none the less a revenue measure because of the extent of the field and the bearing of the various elements included.

(6) The oleomargarine involved in each of these cases was artificially colored within the meaning of section 8.

Section 8, as amended May 9, 1902, after laying a tax of 10 cents per pound upon oleomargarine, limited the operation of this tax by providing:

> When oleomargarine *is free from artificial coloration* that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound.

The question here to be determined is, What constitutes an artificial coloration of oleomargarine within the meaning of this proviso?

In the *Schick* and *Broadwell* cases it is conceded by the witnesses for the dealers that the oleomargarine, which formed the basis of the prosecutions in those cases, was artificially colored by the use of the Wells-Richardson Improved Butter Color, and hence those cases may be dismissed from further discussion under this proposition.

In the *McCray* case the coloring was imparted by using butter which had been colored with the Wells-Richardson Butter Color.

In the *Cliff* case the coloring was produced through the use of palm oil in the manufacture of the oleomargarine.

Now, it is contended in the *McCray* case that the use of butter, artificially colored, in the manufacture of the oleomargarine, did not constitute an artificial coloration within the meaning of the statute. This contention barely merits notice.

The Government concedes that the manufacturer may use any healthful ingredient which in itself is of a yellow color, if it can be used as an ingredient in appreciable quantity, and that such use of an ingredient does not constitute an artificial coloration within the meaning of the statute; but the Government denies that a manufacturer may use an article in so minute a quantity as to constitute no material part of the article when the direct effect of the use of such ingredient is artificially to color the oleomargarine a shade of yellow. That can not be done indirectly which can not be done directly. It is asserted (in the McCray brief, pp. 30–35) that a person may use artificially colored butter in the manufacture of oleomargarine and not subject the article to the 10-cent tax. The contention is that since section 2 of the act of 1886, in defining what shall constitute oleomargarine, includes butter when mixed with other substances, that thereby Congress has recognized butter as a proper ingredient of oleomargarine, and since by section 1 of that act Congress defined butter to be the food product usually known as butter, made exclusively from milk or cream, with or without salt and with or without additional coloring matter, that thereby any butter, whether artificially colored or not, may be used in the manufacture of oleomargarine, and the color thereby introduced does not constitute artificial coloration within the meaning of the statute.

Now to the logician this may be a specious argument; but the difficulty is that after the logical excursion he lands at his starting point. If all butter were, under the definition contained in section 1, *required* to be artificially colored, there might be some force in his argument. But Congress therein recognizes two kinds of butter—the colored and the uncolored; and so, in order to escape the 10-cent tax, oleomargarine manufacturers must use the uncolored variety of butter. Even if all butter were artificially colored, the necessary effect of the law would be that all oleomargarine containing butter would be subject to the 10-cent tax. To exempt the oleomargarine from the 10-cent tax *it must be free from artificial coloration;* that is, at no stage of the manufacture can artificial coloration be introduced into compound, whether directly or indirectly or by means of the use of butter containing the artificial coloring matter. The fact that the color was introduced through the use of artificially colored butter makes it none the less artificial coloration, and requires the payment of tax accordingly.

Nor does the amendment to section 2 made by the act of May 9, 1902, change this conclusion. That amendment provides:

> And any person that sells, vends, or furnished oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any

> artificial coloration, * * * shall also be held to be a manufacturer of oleomargarine, etc.

The only purpose of this provision was to prevent the coloration of the article after it left the factory. But for this provision there would have been nothing to prevent the coloration of the product after that point of time. The manufacturers, in order to escape the tax of 10 cents, could have shipped to the dealers, wholesale and retail, the article in its uncolored state, leaving it to them to do the coloring. If that loophole had been left open, obvious additional requirements of inspection to prevent fraud and evasion would have been called for.

(7) As to coloration by means of palm oil.

In the *Cliff* case the coloration was produced by using palm oil (Rec., p. 10). The formula used in the manufacture of the article sold, as testified by the foreman of the factory at which it was made, is as follows:

> Three pounds of oleo oil; 1 pound and 12 ounces of neutral lard; 2 pounds of cottonseed oil; 1 pound and 14½ ounces of milk; 1 pound and 4 ounces of salt; and 1½ ounces of palm oil; a total of 10 pounds.

The court will observe that of the 160 ounces required to make up the proportions of the formula, but 1½ ounces was palm oil, less than 1 per cent of the entire amount.

What is palm oil, and what was the purpose of its use in this formula? For a full description of its properties and uses we refer the court to Lewkowitsch's "Chemical Analysis of Oils, Fats, and Waxes" (2d ed.), page 517, and to Allen's "Chemical Organic Analysis," vol. 2, part 1 (3d ed.), page 161, both standard works on chemistry.

These chemists (authors) say that palm oil is the product, mainly, of the fruit of two species of palm trees; that in color it varies greatly, ranging through all shades from orange yellow to dark dirty red; in consistency, from soft lard to that of hardest tallow; that when fresh it has a somewhat sweetish taste, but on becoming older it has a rancid and a more or less disagreeable smell; in its fresh state the proportion of fatty acids, calculated as palmitic acid, amounts to 12 per cent, and may in older samples reach 100 per cent; frequently it contains from 50 to 70 per cent of free palmitic acid, and that it is chiefly used in the manufacture of soap, candles, and axle grease.

Moxley, the manufacturer of this oleomargarine, in June, 1902, submitted to the Commissioner of Internal Revenue, for analysis, a sample of *crude palm oil*. After examination and analysis the Commissioner (Rec., p. 9) replied that "the oil was rancid, of bad taste and smell, and that it was considered by this office wholly unfit for use in oleomargarine." Thereupon Moxley submitted a sample of what he termed "refined palm oil." As

to this sample, the Commissioner, after stating that it had been examined and chemically analyzed, says:

> It was found to contain a large amount of free fatty acid; it was by no means free from disagreeable odor and taste, and was of a very deep red or orange color. If oil like the sample were used in any considerable quantity as one of the fatty ingredients, it would undoubtedly cause a condition under which this office would rule that the oleomargarine contained an ingredient deleterious to public health and offensive in taste and odor.

And the Commissioner then continues:

> After this second sample had been submitted and the matter was under advisement in this office, fullest opportunity was given for hearing and oral argument by you and others interested upon the subject of the use of palm oil in the manufacture of oleomargarine. As a result of the examination made of the samples of oil submitted, *it was virtually agreed at the hearing that palm oil* of the grade of the samples examined *could not be introduced* into the manufacture of oleomargarine in considerable quantities as oleo oil, neutral oil, cottonseed oil, butter, or milk is now introduced, *but only in quite small quantities or proportions.* It was further found by examination in this office that, take any given quantity of unartificially colored oleomargarine—the same being virtually white in appearance—if three-tenths of 1 per cent of the palm oil submitted was introduced therein it would give to the finished product a shade of yellow, and that the finished product would in appearance be in imitation or semblance of butter. In other words, that if to the finished sum total of uncolored oleomargarine in weight 1,500 pounds there was added a little less than 5 pounds of this palm oil, the result would be a marked change in color, there being secured through the introduction of the palm oil to the finished product a shade of yellow, causing the finished product to look like butter.

And this is the conclusion of the Commissioner:

> This office rules that where so minute and infinitesimal a quantity of a vegetable oil is used in the manufacture of oleomargarine as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it can not be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used *solely* for the purpose of producing or imparting a yellow color to the oleomargarine, and, therefore, that the oleomargarine so colored is not free from artificial coloration and becomes subject to the tax of 10 cents per pound.

There can be no doubt that the use of palm oil is for artificial coloration. Indeed, any other use would make the product unfit for consumption.

Cliff's witnesses testified as follows upon this point: Hoskins, a chemist, says (Rec., p. 11) that he is familiar with the chemical properties of palm oil; that "it is an edible oil;" and in his opinion "there is nothing deleterious or unwholesome in the use of palm oil, *in the proportion in which it is used in this formula*. That language implies that if it had been used in larger quantities it would have been deleterious to health, as stated by the Commissioner, which is the fact.

On cross-examination he says that a very small proportion of palm oil is necessary to produce a *desirable* color in oleomargarine; that in color it is a reddish yellow.

It plainly appears from the testimony, and by reference to the chemical works cited, that but minute quantities of the oil can be used in the manufacture of oleomargarine; if an appreciable quantity were used, the product would become a dirty red, having no resemblance to butter, and therefore undesirable; if bleached by exposure to air, while losing its color, it will still retain its odor and its large percentage of acids, and becomes rancid, and therefore disagreeable and deleterious; if bleached chemically, it loses both odor and color, and is therefore undesirable for the manufacturer who is seeking the color properties.

The record contains testimony with respect to the use by Moxley of color prior to the taking effect of the present law. On page 20 of the *Cliff* record, his secretary, Dadie, testifies that prior to

July 1, 1902, they used only the Wells-Richardson butter color; since then they have used some of that color *and also some palm oil*. It seems that the manufacturer discovered that palm oil was a wholesome and desirable *ingredient* for use in making oleomargarine immediately after the new law went into effect.

It may be well to repeat here the formulas used in manufacturing the oleomargarine involved in each of these cases:

> *McCray case:* Oleo oil, 20 pounds; neutral lard, 30 pounds; creamery butter 50 pounds; milk and cream, 30 pounds; salt, 7 pounds—137 pounds.

No coloring matter is given for the reason that the butter used contained artificial coloring.

> *Schick case:* Oleo oil, 40 ounces; neutral lard, 71¾ ounces; cream, 28 ounces; salt, 20 ounces; butter color, one-fourth ounce.
>
> *Broadwell case:* Oleo oil, 40 ounces; neutral lard, 71¾ ounces; cream, 28 ounces; salt, 20 ounces; butter color, one-fourth ounce.
>
> *Cliff case:* Oleo oil, 48 ounces; neutral lard, 28 ounces; cotton-seed oil, 32 ounces; milk, 30½ ounces; salt, 20 ounces; *palm oil*, 1½ *ounces*.

Looking at the relative quantities of the different ingredients named in these formulas, to which class would an observant person say palm oil belonged—to the butter fats or to the coloring elements? To put this question is to answer it. The

fact that palm oil is a vegetable oil makes it none the less a vegetable coloring matter. If a wholesome vegetable fat, which the evidence shows it is not, it would not be used in such minute quantities. No one will deny the fact that the more cream or butter used in the manufacture of oleomargarine, the better its quality; it is the one indispensable ingredient in its manufacture, imparting the flavor and the odor, exclusively adding the butyrin elements, which no other fat and no product of manufacturing chemistry can imitate, without which no one would dream of using oleomargarine as a butter; for with all his skill, the chemist can not yet compete with the delicate chemistry of the cow.

(8) May the plaintiffs in error attack the validity of the provision of section 14 conferring finality of decision upon the Commissioner of Internal Revenue?

The Government suggests the point that plaintiffs in error are not in a position to question the validity of the provision of section 14 conferring upon the Commissioner of Internal Revenue the power finally to decide what mixtures are subject to tax under the act.

Certainly *Schick* and *Broadwell* can not, for by the testimony of their own witnesses it is conceded the Wells-Richardson artificial coloration was used. How can they be heard to deny the validity of the power to decide a disputed point when it was not exercised against them?

Is *McCray* in any better position? He admits in his answer that his product contained the Wells-Richardson artifical coloration, but says that because it was introduced through the use of butter containing the coloration it was not *artificial* coloration. Having admitted the coloration was there, it matters not how it came there; his product was not free from artificial coloration.

And in the *Cliff* case, even conceding for argument's sake the invalidity of that provision, it will not avail *Cliff*, for by the testimony of his witnesses the court must hold that the palm oil was introduced for purposes of coloration and not for its fat, and that therefore the article was artificially colored.

(9) The trial court rightfully excluded the testimony for the defendants.

If the court shall hold the law attacked to be valid, then the question whether the trial court properly or improperly excluded the testimony offered on behalf of the defendants, to the exclusion of which exceptions were taken, becomes immaterial. For this reason a discussion of these assignments of error is not deemed necessary.

The Government respectfully submits that the law is valid in all respects and that the judgments in each of these cases should be affirmed.

HENRY M. HOYT,
Solicitor-General.

APPENDIX A.

(Act of August 2, 1886, 24 Stat. 209, as amended by act of May 9, 1902, 32 Stat., 193, the amendments made by latter act being printed in black type.)

Chapter 840. An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purposes of this act the word "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as "oleomargarine," namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable-oil annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance

of butter, or when so made, calculated or intended to be sold as butter or for butter.

SEC. 3. That special taxes are imposed as follows:

Manufacturers of oleomargarine shall pay six hundred dollars. Every person who manufactures oleomargarine for sale shall be deemed a manufacturer of oleomargarine.

And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow, shall also be held to be a manufacturer of oleomargarine within the meaning of said act, and subject to the provisions thereof.

Wholesale dealers in oleomargarine shall pay four hundred and eighty dollars. Every person who sells or offers for sale oleomargarine in the original manufacturer's packages shall be deemed a wholesale dealer in oleomargarine. But any manufacturer of oleomargarine who has given the required bond and paid the required special tax, and who sells only oleomargarine of his own production, at the place of manufacture, in the original packages to which the tax-paid stamps are affixed, shall not be required to pay the special tax of a wholesale dealer in oleomargarine on account of such sales.

Retail dealers in oleomargarine shall pay forty-eight dollars. Every person who sells oleomargarine in less quantities than ten pounds at one time shall be regarded as a retail dealer in oleomargarine. And sections thirty-two hundred and thirty-two, thirty-two hundred and thirty-three, thirty-two hundred and thirty-four, thirty-two hundred

and thirty-five, thirty-two hundred and thirty-six, thirty-two hundred and thirty-seven, thirty-two hundred and thirty-eight, thirty-two hundred and thirty-nine, thirty-two hundred and forty, thirty-two hundred and forty-one, and thirty-two hundred and forty-three of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section, and to the persons upon whom they are imposed: *Provided*, That in case any manufacturer of oleomargarine commences business subsequent to the thirtieth day of June in any year, the special tax shall be reckoned from the first day of July in that year, and shall be five hundred dollars.

Provided further, That wholesale dealers who vend no other oleomargarine or butterine except that upon which a tax of one-fourth of one per cent per pound is imposed by this act, as amended, shall pay two hundred dollars; and such retail dealers as vend no other oleomargarine or butterine except that upon which is imposed by this act, as amended, a tax of one-fourth of one cent per pound shall pay six dollars.

SEC. 4. That every person who carries on the business of a manufacturer of oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than one thousand and not more than five thousand dollars; and every person who carries on the business of a wholesale dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than five hundred nor more than two thousand dollars; and every person who

carries on the business of a retail dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than fifty nor more than five hundred dollars for each and every offense.

SEC. 5. That every manufacturer of oleomargarine shall file with the collector of internal revenue of the district in which his manufactory is located such notices, inventories, and bonds; shall keep such books and render such returns of material and products; shall put up such signs and affix such number to his factory, and conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue, and in a penal sum of not less than five thousand dollars; and the sum of said bond may be increased from time to time, and additional sureties required at the discretion of the collector, or under instructions of the Commissioner of Internal Revenue.

SEC. 6. That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail

dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offence not more than one thousand dollars, and be imprisoned not more than two years.

SEC. 7. That every manufacturer of oleomargarine shall securely affix, by pasting, on each package containing oleomargarine manufactured by him a label on which shall be printed, besides the number of the manufactory and the district and State in which it is situated, these words: "Notice.—The manufacturer of the oleomargarine herein contained has complied with all the requirements of law. Every person is cautioned not to use either this package again or the stamp thereon again, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases." Every manufacturer of oleomargarine who neglects to affix such label to any package containing oleomargarine made by him, or sold or offered for sale by or for him, and every person who removes any such

label so affixed from any such package, shall be fined fifty dollars for each package in respect to which such offense is committed.

Sec. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: Provided, when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound.

The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section.

SEC. 9. That whenever any manufacturer of oleomargarine sells, or removes for sale or consumption, any oleomargarine upon which the tax is required to be paid by stamps, without the use of the proper stamps, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefor and certify the same to the collector. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal.

SEC. 10. That all oleomargarine imported from foreign countries shall, in addition to any import duty imposed on the same, pay an internal-revenue

tax of fifteen cents per pound, such tax to be represented by coupon stamps, as in the case of oleomargarine manufactered in the United States. The stamps shall be affixed and canceled by the owner or importer of the oleomargarine while it is in the custody of the proper custom-house officers; and the oleomargarine shall not pass out of the custody of said officers until the stamps have been so affixed and canceled, but shall be put up in wooden packages, each containing not less than ten pounds, as prescribed in this act for oleomargarine manufactured in the United States, before the stamps are affixed; and the owner or importer of such oleomargarine shall be liable to all the penal provisions of this act prescribed for manufacturers of oleomargarine manufactured in the United States. Whenever it is necessary to take any oleomargarine so imported to any place other than the public stores of the United States for the purpose of affixing and canceling such stamps, the collector of customs of the port where such oleomargarine is entered shall designate a bonded warehouse to which it shall be taken, under the control of such customs officer as such collector may direct; and every officer of customs who permits any such oleomargarine to pass out of his custody or control without compliance by the owner or importer thereof with the provisions of this section relating thereto, shall be guilty of a misdemeanor, and shall be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than three years. Every person who sells or offers for sale any imported oleomargarine, or oleomargarine

purporting or claimed to have been imported, not put up in packages and stamped as provided by this act, shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than two years.

SEC. 11. That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense.

SEC. 12. That every person who knowingly purchases or receives for sale any oleomargarine from any manufacturer who has not paid the special tax shall be liable for each offense to a penalty of one hundred dollars, and to a forfeiture of all articles so purchased or received, or of the full value thereof.

SEC. 13. That whenever any stamped package containing oleomargarine is emptied, it shall be the duty of the person in whose hands the same is to destroy utterly the stamps thereon; and any person who willfully neglects or refuses so to do shall for each such offense be fined not exceeding fifty dollars and imprisoned not less than ten days nor more than six months. And any person who fraudulently gives away or accepts from another, or who sells, buys, or uses for packing oleomargarine, any such stamped package, shall for each such offense be fined not exceeding one hundred dollars and be imprisoned not more than one year. Any revenue officer may destroy any emptied oleomargarine package upon which the tax-paid stamp is found.

SEC. 14. That there shall be in the office of the Commissioner of Internal Revenue an analytical chemist and a microscopist, who shall each be appointed by the Secretary of the Treasury, and shall each receive a salary of two thousand five hundred dollars per annum; and the Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require, employ chemists and microscopists, to be paid such compensation as he may deem proper, not exceeding in the aggregate any appropriation made for that purpose. And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases, are to be taxed under this act; and his decision in matters of taxation under this act shall be final. The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decisions in this class of cases may be appealed from to a board hereby constituted for the purpose, and composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Commissioner of Agriculture; and the decisions of this board shall be final in the premises.

SEC. 15. That all packages of oleomargarine subject to tax under this act that shall be found without stamps or marks as herein provided, and all oleomargarine intended for human consumption which contains ingredients adjudged, as hereinbefore provided, to be deleterious to the public health, shall be forfeited to the United States.

Any person who shall willfully remove or deface the stamps, marks, or brands on package containing oleomargarine taxed as provided herein shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars, and by imprisonment for not less than thirty days nor more than six months.

SEC. 16. That oleomargarine may be removed from the place of manufacture for export to a foreign country without payment of tax or affixing stamps thereto, under such regulations and the filing of such bonds and other security as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. Every person who shall export oleomargarine shall brand upon every tub, firkin, or other package containing such article the word "oleomargarine," in plain Roman letters not less than one-half inch square.

SEC. 17. That whenever any person engaged in carrying on the business of manufacturing oleomargarine defrauds, or attempts to defraud, the United States of the tax on the oleomargarine produced by him, or any part thereof, he shall forfeit the factory and manufacturing apparatus used by him, and all oleomargarine and all raw material for the production of oleomargarine found in the factory and on the factory premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.

SEC. 18. That if any manufacturer of oleomargarine, any dealer therein or any importer or exporter thereof shall knowingly or willfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be the manufacturer of or a wholesale dealer in oleomargarine, all the oleomargarine owned by him, or in which he has any interest as owner, shall be forfeited to the United States.

SEC. 19. That all fines, penalties, and forfeitures imposed by this act may be recovered in any court of competent jurisdiction.

SEC. 20. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act.

SEC. 21. That this act shall go into effect on the ninetieth day after its passage; and all wooden packages containing ten or more pounds of oleomargarine found on the premises of any dealer on or after the ninetieth day succeeding the date of the passage of this act shall be deemed to be taxable under section eight of this act, and shall be taxed, and shall have affixed thereto the stamps, marks, and brands required by this act or by regulations made pursuant to this act; and for the purposes of securing the affixing of the stamps, marks, and brands required by this act, the oleomargarine shall be regarded as having been manufactured and sold, or removed from the manufactory

for consumption or use, on or after the day this act takes effect; and such stock on hand at the time of the taking effect of this act may be stamped, marked, and branded under special regulations of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury; and the Commissioner of Internal Revenue may authorize the holder of such packages to mark and brand the same and to affix thereto the proper tax-paid stamps.

Approved, August 2, 1886.

[Act of May 9, 1902, 32 Stat., 197.]

Sec. 6. Wholesale dealers in oleomargarine, process, renovated, or adulterated butter shall keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require; and such books shall be open at all times to the inspection of any internal-revenue officer or agent. And any person who willfully violates any of the provisions of this section shall for each such offense be fined not less than fifty dollars and not exceeding five hundred dollars, and imprisoned not less than thirty days nor more than six months.

APPENDIX B.

STATE AND TERRITORIAL LAWS RELATING TO OLEOMARGARINE, ADULTERATED BUTTER, RENOVATED BUTTER, AND FILLED CHEESE.

ALABAMA.

Code of 1896: Section 5326 prohibits the manufacture or sale of oleomargarine except in such manner as will advise the consumer of its real character, *free from coloration or ingredients that cause it to look like butter*, by having it stamped with its true name. It is a misdemeanor for proprietors of hotels, boarding houses, restaurants, etc., to serve to guests any composition made wholly or partly out of fat, oil, or oleaginous substance which shall be in imitation of yellow butter.

ALASKA.

General food laws: Section 156 relates to the sale of unwholesome provisions; section 157 to injurious adulterations; section 84 to trade-marks, etc. (Carter's Annotated Code, 1900, part 1, pages 18 and 33.)

(Alaska has no officer authorized to enforce its food laws.)

ARIZONA.

Sections 348 and 349, Criminal Statutes: The law of this State prescribes that every package containing oleomargarine shall be conspicuously branded with the word "oleomargarine," and

requires retail dealers of said product to deliver to each customer purchasing same a printed label bearing the word "oleomargarine," printed in type each letter of which shall not be less than one-fourth of an inch square. The law further requires that proprietors of hotels, restaurants, and other places where meals are furnished for pay, shall inform their patrons (if inquiry is made) that they use oleomargarine or imitation butter, if such be the case.

ARKANSAS.

Act of March 31, 1885: Section 1586 requires that any person who shall sell any article, substance, or compound made in imitation or semblance of butter, or a substitute for butter, and not made wholly of milk or cream, shall brand same with the words "adulterated butter;" or, if such substitute is a compound known as "oleomargarine" or "butterine," the words "oleomarine" or "butterine" shall be legibly branded or stamped thereon. A penalty is provided for violation of this section.

Section 1585 requires that keepers of hotels, inns, restaurants, and boarding houses who shall serve oleomargarine, adulterated butter, or renovated butter to guests shall have the dish in which the butter substitute is placed plainly marked with the words "oleomargarine," "butterine," or "adulterated butter," as will correctly describe the article.

CALIFORNIA.

Act approved March 4, 1897: This act permits the sale of imitation butter or imitation cheese made wholly or partly from oil, fat, or oleaginous

substance, if put up in distinct and separate form, and in such manner as will advise the consumer of their real character, *free from coloration or ingredients that cause them to look like butter* or cheese. Each package containing such products must be legibly and durably stamped or branded with the words "substitute for butter" or "substitute for cheese." It is a misdemeanor to serve to inmates of penal or charitable institutions, receiving assistance from the State, imitation products. Hotels, restaurants, etc., serving such products must inform their guests of that fact by means of a printed placard.

Act of February 23, 1899, defines renovated butter, and requires it to be put up in separate and distinct form, and each roll must be marked with the words "process butter" or "renovated butter."

CONNECTICUT.

Section 2558 provides that no person shall sell, offer, or expose for sale, or take orders for the future delivery of or have in his possession with intent to sell, any article not produced from unadulterated milk or cream, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream, but does not prohibit the manufacture or sale of oleomargarine in a separate and distinct form in such manner as will advise customers of its real character *when free from coloration and from any ingredient that causes it to look like butter*.

Act approved May 18, 1895, prescribes that no imitation butter shall be sold unless there is a plain sign at the outer main entrance of the establishment bearing the words "sold here," preceded by

the name of the imitation article. All oleomargarine must be kept in packages appropriately marked with the name of contents, and the seller must orally inform each buyer that the substance is not butter, and must give the buyer the name of the imitation article. Any article resembling butter and not made wholly from the milk of cows is defined to be imitation butter.

Bakers, etc., using, in the preparation of food for sale, oleomargarine, must inform buyers thereof of the use of such product by means of a sign. Hotels, boarding houses, and restaurants serving oleomargarine to guests shall so inform them by means of a sign bearing the words "oleomargarine used here."

COLORADO.

Act approved April 1, 1895: Section 4 prohibits the manufacture and sale of oleomargarine or filled cheese except in a separate and distinct form, and in such manner as will advise the consumer of its real character, *free from coloration or ingredients that will cause it to look like cheese or yellow butter.*

DISTRICT OF COLUMBIA.

AN ACT to prevent the manufacture or sale of adulterated food or drugs in the District of Columbia, approved October 12, 1888.

This act was practically repealed by the act relating to the adulteration of foods and drugs in the District of Columbia, approved February 17, 1898.

Section 1 of the act of February 17, 1898, provides that no person or agent shall, within the District of Columbia, sell, offer for sale, or exchange any article of food which is adulterated.

Section 10 provides that nothing in this act contained shall be construed as modifying or repealing any of the provisions of "An act defining butter, imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," approved August 2, 1886; or of "An act defining cheese, and also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of 'filled cheese,'" approved June 6, 1896.

DELAWARE.

Section 1, act approved March 9, 1901, provides that when any person exposes for sale in the State of Delaware oleomargarine, butterine, or any similar substance made in imitation or semblance of pure butter, such person shall have conspicuously placed upon the tub, package, or parcel thereof a placard containing the words "oleomargarine," "butterine," or whatever the name of the contents of the package may be, printed thereon in plain, uncondensed gothic letters not less than 1 inch long.

FLORIDA.

Revised Statutes of 1892, section 2662: The laws of Florida make it a misdemeanor to knowingly sell or cause to be sold as butter any spurious preparations purporting to be butter, whether known as "oleomargarine" or by any other name, and imposes a penalty upon hotels or boarding houses who serve to guests spurious butter without giving notice of the use of such "imitation butter."

GEORGIA.

Under the act approved December 16, 1895, it is made a misdemeanor to manufacture, sell, or offer for sale any products made in imitation

of butter or cheese, *and colored to resemble the same*, unless such products are sold as such, and the packages containing same are legibly and durably marked or branded with the word "substitute for butter," or "substitute for cheese," as the case may be. Retail dealers are required to inform their customers to whom such imitation products are sold of their true character, and in addition deliver to each said customer a printed slip stating that the same is imitation butter or imitation cheese.

Hotels, restaurants, etc., serving to guests or using in the preparation of any food imitation butter or imitation cheese must notify said guests, employees, etc., of the fact by means of a printed placard.

HAWAII.

Laws of 1897: Section 187 provides that whoever knowingly sells to any person, or offers for sale, oleomargarine or any substance purporting to be or having the semblance of butter, not made from pure cream, shall be deemed guilty of a misdemeanor and fined accordingly, unless the package containing the same is distinctly marked to indicate its contents.

IDAHO.

Act of March 9, 1903: Section 5 provides that no person shall render or manufacture, sell, offer for sale, expose for sale, or have in possession with intent to sell any substance or compound not produced directly and wholly from unadulterated milk or cream; but permits the manufacture and sale of oleomargarine in a separate and distinct form, and

in such manner as will advise the customer of its real character, *when free from coloration or ingredient which causes it to resemble butter.*

ILLINOIS.

An act approved June 14, 1897 (section 1), defines "imitation butter" as the product produced from any compound or substitute other than pure milk or cream.

Section 2 *forbids the addition of coloring matter in imitation of butter.*

Section 3 prohibits the manufacture and sale of any substance designed to be used as a substitute for butter unless the package containing the article is legibly marked "oleomargarine," "butterine," or "imitation butter."

Sections 1 and 2, act of April 24, 1901, make it unlawful to manufacture, sell, or expose for sale in the State of Illinois renovated or process butter unless the same is plainly branded "renovated butter" in a conspicuous place, to be easily read by the purchaser.

INDIANA.

Section 2181, Revised Statutes, makes it a misdemeanor to sell or expose for sale any butter other than that made from pure cream or milk without first labeling the same in large letters "oleomargarine."

Hotels, boarding houses, etc., serving oleomargarine to guests must label the product so served as "oleomargarine."

Section 1 also provides a penalty for the violation of the above provisions.

INDIAN TERRITORY.

This Territory has no legislation relative to oleomargarine, etc.

IOWA.

Section 2518 *forbids the coloring with any substance whatever* of any substance intended as a substitute for butter, *so as to cause the same to resemble butter*, or the use of any substance which will impart to the compound *the color of yellow butter*, and prohibits the sale thereof.

Section 2517 permits the manufacture of imitation butter and cheese not having a yellow color, and not artificially colored, provided each tub, firkin, box, or other package is clearly and durably branded with the words "substitute for butter," or "substitute for cheese," as the case may be. Hotels, restaurants, etc., serving imitation butter or imitation cheese, must notify their patrons of the fact by means of a printed placard.

KANSAS.

By an act approved March 2, 1889, entitled "An act to provide against the adulteration of foods or drugs," it is prohibited to manufacture or sell oleomargarine, butterine, etc,, under a false name. These mixtures must be distinctly labeled as such.

KENTUCKY.

Under the law of this State oleomargarine, butterine, or kindred compounds, or mixtures of these with butter, *can not lawfully be sold if colored in imitation of butter*. Oleomargarine is permitted to be sold if put up in separate and distinct form and in such manner as to advise the consumer of its

real character, *free from coloration or ingredients that cause it to look like butter*.

Adulterated butter is defined. Process butter which has been melted and made over is classed as adulterated. Packages of such products must be branded with the name of the contents.

(See Pure Food Laws of March 17 and June 12, 1900.)

LOUISIANA.

Act approved July 8, 1886. The laws of this State prohibit the sale, handling, or giving away of oleomargarine, butterine, etc., except when so labeled as unmistakably to indicate the true composition thereof.

MAINE.

Section 3, chapter 128 (as amended March 26, 1895) makes it unlawful for any person to sell, offer for sale, expose for sale, or have in possession with intent to sell, *any substance or compound made in imitation of yellow butter*, and not made exclusively and wholly of cream or milk, whether said article or compound be named "oleomargarine, butterine," or otherwise, and imposes a heavy penalty for a violation of any provision of the section.

MARYLAND.

Article 27, Code of Public General Laws, 1900: The manufacture of any product made from oil, fat, or oleaginous substances in the imitation of butter is prohibited. Oleomargarine may be manufactured and sold in separate and distinct form, and in such manner as will advise the purchaser and the consumer of its real character, *free from coloration or ingredients which cause it to look like*

yellow butter. In the room in which oleomar
is sold or offered for sale must be conspic
posted a placard bearing the words "oleomar
sold here."

Hotels, restaurants, boarding houses, hos
schools, and penal institutions serving oleom
rine to their guests, inmates, or help are re
to orally notify such guests, inmates, or hel
the substance so furnished is not butter, and
display at all times on each and every side
room where the product is served a legibly
durably printed sign, bearing the words "
margarine used here."

MASSACHUSETTS.

Chapter 56, Revised Public Statutes: Pe
the sale of oleomargarine in a separate and di
form and in such manner as will advise the
sumer of its real character, *free from coloratio
ingredients that cause it to look like butter.*
package containing oleomargarine or butt
must be legibly and durably branded with
words "imitation butter," "oleomargarine,
"butterine," and in each room or place w
such products are sold must be posted a pl
containing the words "sold here," preceded b
name of the imitation article offered for
Hotels, boarding houses, etc., serving imit
butter or imitation cheese must notify their pa
of the use of such products.

Renovated butter offered for sale, or sold,
be labeled in such manner as not to be easily
faced, with the words "renovated butter."
sections 37, 41, 44, 47, and 48.)

MICHIGAN.

Act No. 22 of the session laws of 1901; Section 1 prohibits the manufacture or sale of any article, product, or compound made wholly or partly out of fat, oil, or oleaginous substances which shall be in imitation of butter made from milk or cream, but permits the manufacture and sale of oleomargarine in separate and distinct form, and in such manner as will advise the consumer of its real character, *free from coloration or ingredient that causes it to look like yellow butter.*

Section 2 provides a penalty for the violation of the above provisions. (The constitutionality of this law has been upheld by the supreme court of Michigan in case of *People* v. *Hatton*, decided June 24, 1902.)

MINNESOTA.

By the laws of Minnesota "imitation butter" and "process or renovated butter" must be plainly and durably branded with the true name of the contents, and dealers in such products must inform purchasers of the nature of the substance sold or offered for sale. Hotels, boarding houses, etc., serving imitation butter, or process or renovated butter, must notify patrons to that effect by means of a printed placard.

It is a misdemeanor for any person or firm to manufacture or sell or offer for sale any product made wholly or partly out of fat, oil, or oleaginous substance, or compound thereof, *which shall be made in imitation or colored to resemble yellow butter* produced from milk or cream.

(See chapter 256, General Laws of 1899; chapter 141, General Laws of 1897; act April 6, 1901; act March 27, 1886; act March 23, 1889.)

MISSISSIPPI.

Act approved March 9, 1882: Section 1 provides that every person dealing in oleomargarine, or other similar manufactured butter, before offering same for sale, must distinctly and durably mark or brand each package or parcel with the word "oleomargarine," or with whatever name it may be known, and shall offer same for sale by and according to this mark or brand. Every dealer in such articles is required to pay a privilege tax of $50.

MISSOURI.

The law of 1889 requires that the name of any substance made in imitation of butter shall be clearly and indelibly branded, marked, or labeled upon the packages containing same. Hotels or boarding houses serving oleomargarine must clearly and durably mark the vessel in which the compound is served with the words "oleomargarine" or "impure butter."

The law of 1895 defines "imitation butter" as the product made from other than pure milk or cream, made in semblance of butter, and designed to be used as a substitute for butter. The *coloration of imitation butter is prohibited, excepting that intended for export or sale outside of the State*, in which case harmless coloring matter may be added without violating the law. Vessels containing imitation butter are required to be marked with the words "substitute for butter," and to be shipped under its true name.

MONTANA.

An act approved March 4, 1901, forbids the manufacture or sale of any article or substance in semblance of butter or cheese made exclusively

from pure milk or cream, and requires that each package or other inclosure containing such products shall be plainly and durably branded with the words "oleomargarine" or "imitation cheese" to indicate the contents of the package.

Hotels, boarding houses, etc., serving to guests any oleomargarine, imitation cheese, or other similar substances, are required to post up notices to that effect.

House bill No. 80 provides that "every person, company * * * selling oleomargarine, butterine, imitation cheese, and similar substances, shall pay a license of 1 cent per pound for all these articles sold."

NEBRASKA.

Section 2, act of March 5, 1895, provides that no person shall coat, powder, or color with annato, or any other coloring matter whatever, any substance designed as a substitute for butter, whereby such substitute or product *so colored shall be made to resemble butter*, or the product of the dairy, and prohibits the sale within the State of any such colored product.

The act further provides that any article in semblance of natural butter or cheese that is not made exclusively from milk or cream shall be distinctly and durably branded, stamped, or marked so as to advise the purchaser of the contents. This law protects consumers at tables, by requiring keepers of hotels, restaurants, boarding houses, etc., to keep posted a card opposite each table, in a conspicuous place, bearing the following notice: "Imitation butter used here," or "Imitation cheese used here," if such is the case.

NEVADA.

Sections 4906 and 4907, Compiled Laws: Provide that all packages containing any article in semblance of natural butter, manufactured or offered for sale, which is not made exclusively from milk or cream, must bear the word "oleomargarine" distinctly branded or marked thereon.

NEW HAMPSHIRE.

Act approved March 22, 1901: This act prohibits the manufacture or sale of oleomargarine, adulterated butter, or imitation cheese except in a separate and distinct form, and in such manner as will advise the consumer of its real character, *free from coloration or ingredients that cause it to look like butter* or cheese made from pure milk or cream.

Hotels, boarding houses, etc., serving to guests any imitation butter or cheese must notify their patrons to that effect.

NEW JERSEY.

An act of March 22, 1886, provides against the sale of oleomargarine or any substance in semblance of natural butter or cheese except when the tubs, pails, boxes, firkins, vessels, or other packages containing the same are marked or labeled with the words "oleomargarine," "imitation butter," or "imitation cheese."

An act supplemental to the above, approved April 21, 1887, prohibits the sale of oleomargarine, butterine, etc., *containing any coloring matter*, and requires retail dealers selling less than the original package to furnish the purchaser with a printed card or notice of the nature of the substance.

Possession by any person of oleomargarine or any substance not natural butter not contained in a box, tub, or vessel plainly marked and branded in accordance with this act shall be prima facie evidence of intent to sell the same.

NEW MEXICO.

Section 4 of the food act of February 28, 1889, makes it a misdemeanor to sell any article of food which is not of the nature, substance, and quality of the article demanded by the purchaser.

NEW YORK.

The law of April 7, 1902, prohibits the manufacture and sale of imitation butter, whether colored or not, and whether offered for sale as oleomargarine or under any other name whatsoever.

The possession by any dealer of any article or product the manufacture or sale of which is prohibited by this act shall be deemed to have the same for sale if he exposes the same with other merchandise or stock in his place of business.

NORTH CAROLINA.

Pure food laws of February 13, 1899: Section 2 provides that any person, by himself or his agent, who shall knowingly manufacture, sell, or expose for sale, or have in his possession with intent to sell, any article of food which is adulterated or misbranded to deceive the purchaser is guilty of a misdemeanor and punishable by fine and imprisonment.

NORTH DAKOTA.

Act approved March 8, 1901: Section 7639 requires that any person who sells an article in semblance of butter made from oils or fats, and not the legitimate product of the dairy, made exclusively from milk or cream, must legibly and durably brand the product in a conspicuous place with the words "Oleomargarine," "Butterine," or "Patent butter," as the case may be.

OHIO.

Act of May 16, 1894: By the laws of this State oleomargarine may be sold in separate and distinct form, and in such manner as will advise the consumer of its contents, *free from coloration or ingredients that cause it to look like or appear to be butter*. Each package containing such product must be legibly and durably branded with the word "oleomargarine." Hotels, restaurants, etc., using oleomargarine must inform their guests of such fact by means of a printed placard.

OKLAHOMA TERRITORY.

This Territory has no legislation relative to oleomargarine, etc.

OREGON.

Pure-food law.—Act approved February 27, 1901: Section 2 makes it unlawful for any person to offer or expose for sale reworked butter or mixed butter, unless the same is plainly marked "Process butter."

Section 4 forbids the sale of oleomargarine or other substitutes unless put up in a separate and distinct form, and in such manner as will establish their true identity, *free from coloring matter or ingredients causing same to look like butter*.

PENNSYLVANIA.

An act approved May 29, 1901, provides that oleomargarine, or any similar substance not produced from pure cream or milk, *shall be made and kept free from all coloration or ingredients causing it to look like yellow butter*, and the same shall be kept and presented in such a manner as will advise the purchaser and consumer of its real character.

Hotels, boarding houses, and restaurants serving oleomargarine are required to pay a license, and must inform their guests of the nature of the article by means of printed placards.

Oleomargarine must at all times be so marked as to indicate clearly that it is such.

Act approved July 10, 1901, defines renovated butter and provides for manufacture and distinct marking of same.

A penalty is provided for violation of the provisions of any of the above acts.

PHILIPPINE ISLANDS.

Public laws and resolutions passed by the United States Philippine Commission, act 157, section 4, subsection B, page 335: The board of health for the Philippine Islands is authorized to "make inquiry and investigation into * * * employments, conditions, habits, foods, beverages, and medicines, etc." In addition to this city councils are authorized to control the establishment of slaughterhouses and markets and to "provide for and regulate the inspection of meats, fruits, poultry, milk, fish, vegetables, and all other articles of food."

PORTO RICO.

Regulation XXVII.—Standards for articles of food offered for sale in Porto Rico: Paragraph 2 provides that "no butter shall be sold, offered for sale, or transported in or into the island of Porto Rico with the purpose of selling it or offering it for sale as pure butter that contains less than 80 per cent of the fat of cow's milk, more than 16 per cent of water, or more than 7 per cent of salt, and the sale of any article under the name of butter that contains any fat other than that of the milk of cow is prohibited, but this prohibition shall not extend to such goat's butter produced in Porto Rico as may be offered for sale, provided the purchaser is previously informed of its nature."

RHODE ISLAND.

Chapter 146, Public Statutes of Rhode Island, 1896: The laws of this State require that every tub, firkin, box, etc., containing any substance in semblance of butter, and which is not made exclusively from milk or cream, shall bear the word "oleomargarine." Retailers of such substances must deliver to the purchaser a written or printed card bearing the word "oleomargarine."

SOUTH CAROLINA.

Act approved December 22, 1885, makes it a misdemeanor to fraudulently adulterate for purposes of sale any article of food.

SOUTH DAKOTA.

Food and dairy laws.—Act approved March 7, 1901: The laws of this State permit the sale of oleomargarine or filled cheese in a separate and

distinct form, and in such manner as will advise the consumer of the real character, *free from coloration or ingredients that cause same to look like cheese or yellow butter.*

A person having in his possession oleomargarine with intent to sell same is required to place a legible sign in a conspicuous part of the room where such product is sold, bearing the words "Oleomargarine sold here," and shall give to each purchaser a card containing the word "Oleomargarine" and the name and per cent of the ingredients contained therein.

TENNESSEE.

An act approved March 24, 1897, prohibits the manufacture, importation, or sale, or offering for sale, of any article of food or drink which is adulterated or misbranded.

TEXAS.

Article 427 (393), chapter 2, Penal Code Revised Statutes of 1895, provides that any person who fraudulently adulterates for purposes of sale any substance intended for sale with any substance injurious to health shall be punished by a fine not less than $50 nor more than $500.

UTAH.

Food and dairy laws in effect March 14, 1901: Section 736 permits the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, *free from coloration or ingredient that causes it to look like butter.*

Sections 738 and 739 require that packages con
taining oleomargarine, butterine, or similar sub
stances, offered for sale, shall be legibly an
durably marked to indicate the contents, and fur
ther that the room or place in which such product
are sold shall have posted in a conspicuous portio
thereof a placard bearing the words "Oleomarga
rine sold here," or "Butterine sold here."

VERMONT.

Act approved November 22, 1900: Section
defines butter and cheese as the products usuall
known by these names and manufactured exclu
sively from milk or cream, with salt and rennet
and with or without coloring matter.

Sections 1 and 2 require any products made i
imitation or semblance of butter or cheese as
substitute for butter or cheese to be sold as such
and the packages containing same to be marke
with the following words in a durable and legibl
manner: "Imitation butter," "oleomargarine,"
"butterine," or "imitation cheese," as the cas
may be.

Section 3 provides a penalty for the violation o
the above sections.

VIRGINIA.

Act approved March 6, 1900: Section 1 makes i
unlawful to manufacture or sell as, or for, butter
any article made wholly or partly of fat or oleag
inous substance or compound not produced fro
pure milk or cream, but it allows the manufactur
or sale of oleomargarine, butterine, or kindred com
pounds, in separate and distinct form, and in suc
manner as to advise the customer of its real char
acter. Said product *to be free from coloration o
ingredients that cause it to look like butter.*

Section 2 requires persons using in preparation of food, or serving butterine or oleomargarine to guests, boarders, etc., of hotels or eating houses, to post up notices in conspicuous public places, as follows: "Imitation butter used here."

WASHINGTON.

Dairy and food laws of 1899, chapter 43: Section 5 makes it a misdemeanor to manufacture or sell as or for butter any oleaginous substance or compound not produced from milk or cream.

The law allows the manufacture of sale of oleomargarine in separate and distinct form, *free from coloration or ingredients that cause it to resemble butter*, and in such manner as to apprise the customer of its real character, but requires that persons dealing in, or serving to patrons, guests, boarders, etc., of hotels or eating houses, to post up notices to that effect.

Section 30 makes it unlawful for any person, firm, or corporation to have in his possession with intent to sell, butter known as "Process butter," unless the package is branded with the words "Renovated butter."

WEST VIRGINIA.

Code of West Virginia, page 1115: The law of this State requires that it shall be unlawful for any manufacturer or vendor of oleomargarine, artificial or adulterated butter, to manufacture or offer for sale within the limits of this State such products *unless the same be colored pink*.

(This law has been held constitutional by supreme court of West Virginia. See *State* v. *Meyers*, 42 W. Va., 822.)

WISCONSIN.

An act approved April 9, 1901, m
demeanor to manufacture, or sell a
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made in imitation or semblance of
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sold here," as the case may be.

Section 4607–D, Statutes of 1898
hotels, boarding houses, etc., dealin
to guests oleomargarine, butterine,
stances, must post up notices to tha

WYOMING.

Section 5109, Revised Statutes of
that any person who adulterates
article of food with fraudulent int
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to be offered for sale as unadulterated
is guilty of a misdemeanor and puni

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Supreme Court
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JAMES H. MCKENNEY
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

ADOLPH CLOTT, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 221.

FREDERICK J. SCHICK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 222.

WILLIAM BRODRICK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 223.

LEVI W. MCCLAIN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 224.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF JURISDICTION, WITH ADDITIONAL REMARKS UPON THE MERITS.

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

AUGUST CLIFF, PLAINTIFF IN ERROR, v. THE UNITED STATES.	No. 221.
FREDERICK J. SCHICK, PLAINTIFF IN error, v. THE UNITED STATES.	No. 222.
WILLIAM BROADWELL, PLAINTIFF IN error, v. THE UNITED STATES.	No. 223.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

GEO. W. MCCRAY, PLAINTIFF IN ERROR, v. THE UNITED STATES.	No. 301.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF JURISDICTION, WITH ADDITIONAL REMARKS UPON THE MERITS.

I. RESPECTING JURISDICTION.

These cases were all proceedings to recover a penalty, incurred under section 11 of the oleomargarine act.

The Cliff, Broadwell, and Schick cases were instituted by information, and a stipulation was filed, whereby a trial by jury was waived.

The McCray case was instituted by petition. The defendant filed an answer, to which the plaintiff demurred, and the demurrer was sustained by the court.

As to the nature of an information to recover a penalty—whether civil or criminal.

A penal *action* is defined to be the civil suit brought for the recovery of a statutory forfeiture when inflicted as a penalty for an offense against the public. (16 Ency. Pl. and Prac., p. 231, and cases cited.)

In *Atcheson* v. *Everett* (1 Cowp., 382) Lord Mansfield said:

> There is no distinction better known than the distinction between civil and criminal law; between criminal prosecutions and civil actions. Mr. Justice Blackstone and all modern and ancient writers upon the subject distinguished between them. *Penal actions were never yet put under the head of criminal law or crimes.* * * * It is as much a civil action as an action for money had and received.

Informations to recover penalties and forfeitures seem to have been recognized as civil proceedings by this court, although in *Ex parte Wilson* (114 U. S., 417) the fact was noted that in recent years *prosecutions* by information have greatly increased.

In *Clifton* v. *United States* (4 How., 242), the court said that an information for a forfeiture "is in the nature of a criminal proceeding," and for that reason held that one good count was sufficient to support a verdict and judgment upon all the counts, though some were bad. In *Snyder* v. *United States* (112 U. S., 216), it was held that while informations under the revenue laws are not strictly criminal cases, but are civil actions, yet "they are so *in the nature* of criminal proceedings as to come within the rule that a general verdict, upon several counts seeking in different form one object, must be upheld if one count be good." [Citing *Clifton* v. *United States*, 4 How., 242, 250.]

A distinction is thus indicated between such informations and those for the recovery of a penalty; in the one case the proceeding being *in rem* and in the other *in personam*.

The statutes also seem to make a distinction between penalties and forfeitures on the one hand and criminal offenses on the other (secs. 1044, 1046, 1047, R. S.), and the oleomargarine law appears to notice the legal distinction between a fine and penalty (secs. 4, 6, 7, 9, 12 *et seq*); but in view of the word "offense" in section 11 of the oleomargarine act, there is ground for saying that the penalty which it provides was imposed as a fine for the violation of what is made a misdemeanor.

If an information to recover a penalty be a civil action, trial by jury in these cases could have been waived; but in the absence of an agreed statement of facts, how far are the judgments therein open to review?

In *Henderson's Distilled Spirits* (14 Wall., 33), the court said:

> Being a seizure on land, the claimant was entitled to a trial by jury, but he appeared and the parties entered into a stipulation waiving a jury, and submitted the case to the court *upon an agreed statement of facts*, as they had a right to do, even before any legislative provision was enacted for waiving a jury by a written stipulation.

In *Rogers* v. *United States* (141 U. S., 548) the parties filed a written stipulation waiving the right of trial by jury, and the court filed findings of fact, which stated that it had "heard the testimony of the witnesses." Upon these findings judgment was rendered for the United States. This court said:

> The circuit court could not properly consider *any of the matters raised by the bill of exceptions;* nor can this court do so. All that the circuit court could do was to affirm the judgment of the district court; and all that this court can do is to affirm the judgment of the circuit court.
>
> * * * * *
>
> *Without considering any questions on the merits*, the judgment of the circuit court is therefore affirmed.

It may be doubted, however, whether, in the *Rogers* case, the court intended to be understood as holding that no question of law presented by the record in a civil case, tried by the court without an agreed statement of facts, could be reviewed on error, even if that question appeared independently of any issue of fact decided by the court. The court did not, in the present cases, make any findings of fact, there being no dispute as to the matters of fact out of which the constitutional questions arose. In the *Rogers* case, the particular question of law presented for determination rested upon the disputed fact, found by the court, that the bond sued on was given voluntarily. Here, the constitutional questions are distinctly presented in the several motions to find the defendant not guilty, as well as in arrest of judgment, and resting as they do upon undisputed facts, would seem to be open to review, the court confessedly having jurisdiction.

Trial by jury in criminal cases—when a constitutional right.

Treating the present proceedings by information as criminal actions, it seems proper to consider, at the outset, in what cases trial by jury is a matter of constitutional right.

The authoritative decision on this question is *Callan* v. *Wilson* (127 U. S., 540). In that case,

Mr. Justice Harlan, delivering the opinion of the court, said (p. 552):

> According to many adjudged cases, arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate, there are certain minor or petty offenses that may be proceeded against summarily and without a jury; and in respect to other offenses, the constitutional requirement is satisfied if the right to a trial by jury in an appellate court is accorded to the accused.

The opinion proceeds to cite State authorities [among others *Byers* v. *Commonwealth*, 42 Pa.; see reference thereto in Mr. Guthrie's brief on jurisdiction, p. 10] which recognize the extensive and summary power constantly exercised in the States for the repression of breaches of the peace and petty offenses, which is not supposed to conflict with the constitutional provisions securing to the citizen a trial by jury. It is true that these cases are based upon particular State laws, and that the offenses principally in mind are those which violate various municipal regulations.

The doctrine which that case establishes is that those misdemeanors of a *serious* character which were triable by jury at common law, and which involve a deprivation of the liberty of the citizen, must, as a matter of constitutional right, be tried by jury in courts of the United States.

Assuming that section 11 of the oleomargarine act makes the act of purchasing or receiving oleo-

margarine which has not been branded or stamped as required by law a misdemeanor, it can hardly be classed, like the offense of conspiracy, involved in *Callan* v. *Wilson*, among those crimes the nature and consequences of which are so serious as to entitle a person accused thereof to trial by jury.

In *Brewster* v. *The People* (183 Ill., 143), in which it was held that, in view of the peculiar wording of the State constitution, the right of trial by jury in the case of a misdemeanor, punishable only by fine and imprisonment, could be waived, the court said:

> "No jury trial in criminal cases was ever known to the common law, but such as followed upon indictment in a common-law court, after the accused was in custody, had been arraigned, and had pleaded [not] guilty to the indictment." (*People* v. *Fisher*, 20 Barb., 656; *People ex rel.* v. *Justices*, 74 N. Y., 406; *State* v. *Conklin*, 27 Vt., 319.) As jury trials in criminal cases, as known to the common law, were such as followed upon indictment in a common-law court, and as our Constitution refers to the right of trial by jury, as it was understood at common law, then the prohibition against the right to waive a trial by jury can not apply to misdemeanors, because the Constitution expressly provides that, in cases of misdemeanors, a person may be held to answer without indictment.

It is doubtless proper to observe that the practice in the district courts of the United States has been

to try all criminal cases, whether felonies or misdemeanors, by jury. Those courts have no jurisdiction of municipal offenses, such as were referred to in *Callan* v. *Wilson* as those in which trial by jury would not be a matter of constitutional right. In that case the court was confronted with the peculiar situation which exists in the District of Columbia, where the courts of the United States exercise both a general and a municipal jurisdiction. And it is also true that there is no Federal statute expressly authorizing waiver in criminal cases like the State statutes of that kind.

It is also to be observed that Mr. Justice Story, in *United States* v. *Gibert* (2 Sumn., 19; Fed. Cas. No. 15204), was of opinion that in the case of a misdemeanor there never could be any other trial than by jury. The charge in that case was robbery on the high seas.

In the case of *Bonner* (151 U. S., 242) the view was expressed that the trial of a criminal case in a Federal court could be in no other way than by jury. The charge in that case was larceny.

As to waiver.

In *United States* v. *Taylor* (11 Fed. Rep., 470) an information had been filed in the district court for the district of Kansas, charging the defendant with the offense of carrying on the business of a retail liquor dealer without having paid the special taxes required by law. In the course of the trial the court directed the jury to return a verdict of

guilty. This was held to be error by the circuit court, which, in the course of its opinion, referring to the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed guaranteed by the sixth amendment, said:

> This is a right which can not be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner's consent is erroneous.

It seems that the contrary view as to the right of the court to direct the jury to return a verdict against the defendant had been announced by Mr. Justice Hunt in the case of *United States* v. *Anthony* (11 Blatchf., 200). But Judge McCrary, in commenting on that case, remarks that Judge Hunt seems himself to have doubted the soundness of the ruling, because upon a subsequent trial for the same offense a verdict of guilty was not ordered and the case was submitted to the jury; and it should be observed that Judge McCrary also states that he had consulted Mr. Justice Miller, who authorized him to say that the learned justice concurred in the conclusion which Judge McCrary reached.

United States v. *Shaw* (59 Fed. Rep., 110), however, distinctly asserts the right of an accused person to waive trial by jury. The court said:

> Many of the cases where the right of the accused to consent to the discharge of a juror is denied were those where the accused

was being tried for murder, and there might be capital punishment. (See *Cancemi* v. *People*, 18 N. Y., 128; *Territory* v. *Ah Wah*, 4 Mont., 149, 1 Pac., 732; *Hill* v. *People*, 16 Mich., 354.)

In the case under consideration the offense charged, of which the defendant has been convicted, is declared by the statute to be a misdemeanor; and had the juror Pendleton been discharged by the court with the consent of the defendant, we are of opinion that both reason and the weight of authority would have sustained the action of the court, and the discharge would not have been a legal ground for a new trial. (See *Tyra* v. *Com.*, 2 Metc. (Ky.), 1; *State* v. *Kaufman*, 51 Iowa, 578; *Com.* v. *Dailey*, 12 Cush., 80.)

In the *Belt case* (159 U. S., 95) it appeared that the supreme court of the District of Columbia had sustained the constitutionality of an act of Congress providing that in prosecutions in the police court of the District, in which, according to the Constitution, the accused would be entitled to a jury trial, the accused might in open court expressly waive such a trial and request to be tried by the judge. This court did not, however, pass upon that question, holding that the only question presented was as to the jurisdiction of the supreme court of the District to decide the matter, which it upheld. In that case, however, the court refers to *Hallinger* v. *Davis* (146 U. S., 314, 318), in which it was said:

> Upon the question of the right of one charged with crime to waive a trial by jury and elect to be tried by the court, when there is a positive legislative enactment giving the right so to do, there are numerous decisions by State courts upholding the validity of such proceeding.

In *Hallinger* v. *Davis* it is to be observed that the court was passing upon a State law authorizing a jury trial to be waived, and upheld it although the crime was capital.

In *Thompson* v. *Utah* (170 U. S., 343) the court, speaking by Mr. Justice Harlan, said (p. 353):

> It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of *felony*, by consent expressly given, or by his silence, to authorize a jury of only eight persons to pass upon the questions of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.

The inference from this adjudication is that in cases of felony trial by jury can not be waived; for if an accused can not consent to be tried by less than twelve jurors, he can not consent to dispense with a jury altogether.

The ruling in *Thompson* v. *Utah*, as shown by the reference therein to the *Hopt* case (110 U. S. 574), proceeds upon the theory that the accused and the only one concerned in the manner of his trial, but that society in general is interested in all proceedings that affect or destroy either the life or liberty of its members.

The language of the third article of the Constitution is imperative—"the *trial* of all crimes, except in cases of impeachment, *shall* be by jury." The *right* of trial by jury was protected in the sixth and seventh amendments. They provide respectively:

Sixth amendment.

> In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Seventh amendment.

> In *suits at common law*, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

In *Bank of Columbia* v. *Okely* (4 Wheat., 235) the court, in holding that the defendant could properly be held to have waived his right to a trial by jury in that case, a civil suit, said:

> That this mode of proceeding is perfectly full effect to the seventh amendment of the Constitution is not only deducible from the general nature but from the express wording of the article referred to. That the former been that "*the trial* by jury shall be preserved" it might have been contended that they were imperative and could not be dispensed with, but the words are, that the *right* of trial by jury shall be preserved, which gleave it on the foot of a fee gre or *inheritance*, and the benefit of it may therefore be relinquished.

May not the same idea be attributable to the Sixth Amendment; and is it not therefore impossible, in dealing with a minor offense, as here, to waive the right, without contravening the general and imperative provision of the Constitution itself as to *serious crimes*?

As to the suggestion that the defect, if one exists, is matter of procedure, and does not constitute a total lack of jurisdiction, I submit whether the question of waiver here may not be held similar to that raised in the *Bessett* case, wherein the question is put in this form: "Is the judgment of the court, not being based on the verdict of a jury, a nullity, or is a trial by the court without the

waiver of a jury at most only error?" (*Maxwell* v. *Stewart*, 21 Wall., 71; 22 Wall., 77; *Humphreys* v. *District of Columbia*, 174 U. S., 195.)

The McCray case properly before the court.

Whatever the fate of the proceedings by information, the McCray case would appear to be properly before the court. That case is civil in form as well as in substance; and, having been decided upon demurrer to the answer, no question as to trial by jury is presented. The vital question in all of these cases, namely, the constitutionality of the act, may therefore in any event be determined by the court, in the light of those facts of which it can take judicial notice.

II.—ADDITIONAL REMARKS UPON THE MERITS.

The reply brief.

Judge Cooley in *Constitutional Limitations* not only says that not everything which may be done under the name of a tax is not necessarily a tax, but also that (p. 593):

> The power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restriction whatever except such as rest in the discretion of the authority which exercises it.

The context shows that the abuse which he is deprecating is the levying of a tax for private benefit in reality, although ostensibly for public objects.

The learned gentlemen are mistaken in saying that I have fallen into serious error as to the law of Illinois. The law which I quoted is on the statute books of that State, and shows the intent of its legislature and how completely that body was intending to carry out the will and policy of the people. Counsel unwarrantably state that Illinois "does not prohibit, but *freely permits*" the manufacture and sale of colored oleomargarine, because in one case in a court of that State (not the supreme court), initiated by the same oleomargarine manufacturer, who is the real complainant here, the prohibitive feature of the State law was declared to be unconstitutional. And another case is cited in which the ground of decision was that the suit was a collusive one between two dealers in oleomargarine.

As to the remainder of the act, which Mr. Guthrie says is found to afford adequate protection to the public against injury, it is to be observed from his abstract "that no person shall be allowed to have in possession or under control any package of oleomargarine except for personal consumption or that of his family." If this section does not mean to strike at the deception in houses of public entertainment and does not justify the distinction which I have noted between a sale possibly open and fair and an illicit use between the sale and the consumption by which the real consumer unknowingly receives the article as butter, I am unable to see what its purpose is.

There is no change of front in the Government argument. It was never admitted by the Government that the tax is prohibitory or destructive. Nevertheless the Government's formal position, sustained by the lower court, that evidence to that effect was immaterial, was and is correct. Yet the Government now has a perfect right upon these records to argue that the tax does not amount to prohibition or destruction.

On pages 14 to 18 of the reply brief counsel appear to think that they have directed a destructive criticism against the Government figures showing that the injury to the colored oleomargarine business has not been excessive. They charge that the Government excluded uncolored oleomargarine from the total production under the old act (which is *not* the fact), and then proceed to do exactly the same sort of thing which they unwarrantably charge the Government with doing—that is, they impressively allege that there has been a falling off from 123,000,000 pounds in production to 2,700,000 pounds, or nearly 98 per cent, but studiously exclude the 68,000,000 pounds of uncolored oleomargarine which were produced during the period under review.

The whole import of the opposing argument is that oleomargarine is only oleomargarine when it competes with butter: in other words, when it is colored; that when it is uncolored, in its natural state, it is really not oleomargarine at all. Concealed in all this there is the simple demand that

the oleomargarine interests shall be left free to compete with butter.

Now observe how counsel argue both that there was and that there was not such an article as uncolored oleomargarine before the present law. At one point they manifestly contemplate the uncolored article as existing and produced under the old law. They show this contemplation more clearly when they say the one-fourth cent tax is a new levy on a *hitherto* untaxed article—"an article *theretofore* free from any tax;" and they immediately proceed to state, with the idea of showing that the tax on the uncolored article is a new tax and no tax on that article was ever imposed before, and the Government's claim of reduction of tax on the uncolored article is erroneous, that all oleomargarine, "*properly so called*," was sold as a substitute for butter, and that therefore it had to be colored as butter to meet the consumer's demands. In other words, the only possible meaning of this claim is clearly antagonistic to what has preceded, that all oleomargarine before the new act was passed was colored, and that there was then no such thing as uncolored oleomargarine. And if the latter contention is the real one, and if that was indeed the fact, then manifestly they were proceeding in defiance of State laws.

It is, of course, impossible to maintain that uncolored oleomargarine was unknown before the law of 1902 was enacted (see *post*). But either

there was or there was not uncolored oleomargarine prior to July 1, 1902. If there was, then it was taxed at 2 cents per pound, and the present tax is a reduction. If there was not, then the Government figures as to the total production are not subject to the untenable challenge which counsel make, and the present falling off in production is as the Government states and not as counsel seek to show. In any case it seems plain to me that Mr. Guthrie has entangled himself in the same dilemma which he seeks to cast around the Government (pp. 15–17, reply brief).

I remark that Mr. Guthrie's own brief in the second case of *Collins* v. *New Hampshire*, involving a later New Hampshire law, heard at October term, 1901, and affirmed by an equally divided court (187 U. S., 636, 637), speaks of colored oleomargarine and *uncolored* or *white* oleomargarine.

The words "regulatory tax" referred to by counsel were only used in the Government's brief in referring to certain remarks in the Senate debate, and were simply transferred from the language there used. The Government does not call this a *regulatory* tax, except in so far as appears in *In re Kollock*, and this word was not intended to import and does not import any illegitimate regulation of State commerce.

I am entirely unable to comprehend what counsel means when asserting that the higher rate affords no such protection against evasion, as the argument in the Senate suggested. They say,

"On the contrary, the increased gain to such offenders by reason of the higher rate would only be a so much greater incentive to offend." The force of that observation escapes me, because I can not understand how the higher rate would be an increased gain to offenders, unless it is meant that some persons would proceed to offend notwithstanding the law, and would be successful in passing off their product as butter, and thus escape even the one-fourth cent tax.

The difference between oleomargarine and butter is difficult to detect, not "because they are practically the same, contain the same ingredients, and are equally palatable, digestible, and wholesome." Counsel can not justify this statement by the insertion of the word "practically;" they do not contain the same ingredients; they do not even contain the same chemical elements, except in part, and few people, I imagine, upon an *experimentum in corpore vili*, would testify that they are *equally* palatable, digestible, and wholesome; although it may possibly be (the proposition is disputed) that oleomargarine is palatable, digestible, and wholesome. The difference is difficult to detect simply because the *physical appearance* of the two articles—butter and colored oleomargarine—is practically the same.

Counsel, pursuing the suggestion of *reductio ad absurdum*, uses another two-edged word when he characterizes a part of the Government argument as "preposterous" (p. 20). Counsel can not affect

to misunderstand what the Government brief meant when it spoke about the colored article as inevitably imitative and fraudulent in effect. The statement could not possibly be misinterpreted as referring to anything else than butter in suggesting imitation. And so counsel, after the dialectical play, concludes with a second assertion of the utter fallacy of the Government's reasonable suggestion that the high tax on the colored article would naturally tend to prevent its escaping all tax because it counterfeited the untaxed article, butter.

I presume that counsel in their conclusion on this matter (p. 21, reply brief), saying "in order to facilitate the collection of revenue on *colored* oleomargarine," do not intend to misstate the word, since they are perfectly well aware that it is the collection of revenue on *uncolored* oleomargarine which may be thus facilitated and protected.

Counsel say, in arguing that the court will not uphold this tax as seeking "to *destroy* a counterfeit or imitation of an *untaxed* article," and that the fraud practiced has been with respect to butter—that "in view of the strict supervision exercised by the Government over manufacturers it is unreasonable to suppose that the payment of taxes could be evaded because of the resemblance to butter, *or that Congress intended to strike at any such evil.*" But counsel plainly themselves suppose that Congress intended to strike at the evil; otherwise they would not have pointed out the debates to the court, which was done to inform

the court that the motive of Congress was to strike at the evil, and was unwarrantable and unjust. But here, it may be, they refer to the evil of thus evading the tax, and not the evil of imitating butter, considered by itself.

The customs decisions which counsel cite, holding that under a law which continued the precarious color standard as to the quality of sugar the later and more accurate and scientific polariscopic test could not be required by Treasury regulations, are not applicable. Here there is no such defective legislation of Congress, and the law does not permit such an evasion of this act, because if there is any artificial coloration, oleomargarine being naturally white, though not pure white, the determination of the question is legally conferred upon the Commissioner. Here the law expressly says that if the goods are manufactured in a certain way, the burden of the high duty rests upon them. There is no ambiguity which calls into effect a Department regulation of doubtful validity, but the law itself makes the regulation. The Commissioner is not altering or enlarging the law by a regulation, but he simply decides the question of coloration under an explicit authority conferred by the law.

The facts and figures again.

It was argued that the Government having, by the reference to the remarks of certain Senators made during the debates on the amendment (Government brief, p. 63), opened the door to a general

reference to the debates, the plaintiffs in error are entitled to make general reference thereto in order to show the intention of Congress in imposing this tax.

But the remarks of the Senators to which attention was directed by counsel for the Government were made in support of the proposition that Congress had the legal right to impose the tax; and in suggesting this argument in the brief I did not show the motives or mere opinions of the legislators. Mr. Guthrie's own reading from the debates shows the strength of the legal argument made by a distinguished Senator and lawyer for sustaining the higher tax on the colored article to prevent the easy evasion of the tax on the uncolored article, by reason of the resemblance to the untaxed article—butter—that is, to prevent evading the payment of any tax at all.

The difficulty with counsel for plaintiffs in error in arguing (brief in reply, p. 16) that the ¼-cent tax was not a reduction, but a new tax on a theretofore untaxed article is that they frequently collide with their own arguments as I have already endeavored to show. Thus, on page 14 of their principal brief, as showing the history of the manufacture of oleomargarine, they refer the court to the Ency. Brit., vol. 17, p. 760; Cent. Dic. and Cyc., vol. 5, p. 4101. They might also have cited Ency. Brit., vol. 4, p. 592; Cent. Dic. and Cyc., vol. 1, p. 738; and Stand. Dic., vol. 2, p. 1225.

These books of reference cited by opposing counsel show that originally there was a wide distinction between oleomargarine as it was then known and what they now claim it *to have been*. Originally oleomargarine was made from the leaf or caul fat of cattle, and "imitation butter" or "butterine" (now included under the term "oleomargarine") was made by churning *with oleomargarine*, milk, cream, or butter, so as to make an imitation butter; or, as it was then commercially known, "imitation butter" or "butterine." These distinctions apparently existed at the time of the passage of the oleomargarine act in 1886, for each is specifically named in the second section thereof. That section provides, "That for the purposes of this act," "all substances heretofore known as oleomargarine, * * * butterine, lardine, suine," etc., "shall be known and designated as oleomargarine." From this it seems clear that the substance *which is now claimed to have been oleomargarine* was, at the time of the passage of the act of 1886, *commercially known* as "butterine" or "imitation butter." Even now there is a distinction between the legal and the commercial meaning, for Dadie says (Cliff Rec. pp. 18, 19) that while legally it is called "oleomargarine," "in trade it is known as butterine."

So when counsel assert that prior to the passage of the amendment of May, 1902, there was no substance embraced within the term "oleomargarine" as defined in the original act, free from artificial

coloration, they squarely contradict the historical facts to which they have called attention. So far is it from the truth that the uncolored article was not being manufactured and would have been exempt from tax had it been manufactured, that it was the *one* substance known at the time of the passage of the act as *oleomargarine*, and formed the basis of all other similar substances used as a substitute for butter, and which were afterwards, by the express language of the act, designated, for the purposes of taxation, as oleomargarine.

It was urged that the act was not a revenue act, because the revenue produced under its operation was but trifling. In answer to this claim we call attention to the report of the Commissioner of Internal Revenue for the year ending June 30, 1903. Upon pages 158 and 159 of the report is this information:

Taxes collected on colored oleomargarine, at the rate of 10 cents per pound	$272,044.48
Taxes collected on uncolored oleomargarine, at the rate of one-fourth cent per pound	171,227.48
License taxes:	
Manufacturers	19,966.00
Retail dealers in colored oleomargarine	73,638.25
Retail dealers in uncolored oleomargarine	107,159.36
Wholesale dealers in colored oleomargarine	30,538.16
Wholesale dealers in uncolored oleomargarine	58,988.72
Total revenue	736,783.31

The table also shows that there were imported during the year nearly 22,000 pounds of oleomarga-

rine, upon which a tax of 15 cents per pound was paid.

Upon pages 154 and 155 of the report the total production for the year is shown to be:

Uncolored oleomargarine	pounds	67,573,689
Colored oleomargarine	do	5,712,257
Total		73,285,946

Of the colored oleomargarine produced, the tax of 10 cents per pound was paid upon 2,312,493 pounds, the remainder being exported free of tax.

It was further claimed that the production of oleomargarine for the months of July, August, and September of the present year shows a falling off in production from the corresponding months of the previous year, thus indicating a gradual destruction of the industry. To show that this is not the fact, but that the production of oleomargarine is always less during the summer than during the winter months, we print below a letter from the Commissioner of Internal Revenue, in which is set out the monthly production of both colored and uncolored oleomargarine from the time the present law took effect to October 1 of the present year:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE.
Washington, December 7, 1903.

Hon. H. M. HOYT,
Solicitor-General.

SIR: In compliance with your request of the 5th instant, I have the honor to state that the production of oleomargarine

taxed at the rate of 10 cents per pound and at the rate of one-fourth cent per pound, from July 1, 1902, the time the present law took effect, to November 1, 1903, is as follows:

Month.	Production, 10 cent tax.	Production, one-fourth cent tax.
1902.		
July	283,825	4,645,204
August	261,077	3,139,914
September	432,253	4,375,149
October	507,844	6,365,767
November	509,815	6,613,311
December	746,968	8,854,808
1903.		
January	603,834	7,346,436
February	556,606	6,356,339
March	598,163	6,355,464
April	541,628	6,362,625
May	356,650	3,742,080
June	311,744	3,416,592
July	284,828	3,268,805
August	285,261	3,502,618
September	281,053	4,268,993
October	322,077	4,987,703

Respectfully,

ROBT. WILLIAMS, JR.,
Acting Commissioner.

During the argument the question was asked from the bench whether an internal-revenue tax was now imposed upon other articles than tobacco and liquors. The list of articles is as follows:

OPIUM. Section 36 of the tariff act of October 1, 1890 (26 Stat., 567), imposed an internal-revenue tax of $10 per pound upon all opium manufactured in the United States for smoking purposes, and provided that no person other than a citizen of the

United States could engage in its manufacture. That act also imposed an import duty of $12 per pound upon all opium imported for smoking purposes.

Under the tariff act of July 24, 1897 (30 Stat., 153), the duty on opium imported for smoking purposes was reduced to $6 per pound. As a result, no opium for smoking purposes is manufactured in the United States.

FILLED CHEESE.—The act of June 6, 1896 (29 Stat., 253), after imposing special taxes on manufacturers and dealers in filled cheese, and after defining what should constitute filled cheese, imposed a tax of one cent per pound thereon. This act is now in force.

MIXED FLOUR.—Sections 35 to 47 of the war-revenue act of June 13, 1898 (30 Stat., 467), after defining "mixed flour," and after imposing special taxes on persons making, packing, and repacking the same, imposed a tax thereon of 4 cents per barrel; and, when such flour is imported, in addition to the import duties, the same internal-revenue tax shall be paid thereon.

This act is now in force.

PLAYING CARDS.—By the act of August 28, 1894 (28 Stat., 509), a stamp tax of 2 cents was imposed upon each pack of playing cards. This law is now in force.

The act of May 9, 1902 (32 Stat., 193), being the act amending the oleomargarine law, after defining "adulterated butter" and "process" or

"renovated butter," and after imposing special taxes upon the manufacturers and dealers therein, imposes a stamp tax of 10 cents per pound upon "adulterated" butter and a tax of one-fourth cent per pound upon "renovated" or "process" butter. This act is now in force.

I believe these are the only articles upon which an internal-revenue tax is at present laid. It is to be assumed that Congress, in selecting these subjects for taxation, has kept in view the general welfare of the people. It is also to be noted that Congress in imposing these taxes has laid them upon articles which are the objects of luxury or indulgences, or by means of which it is likely that fraud and deception will be practiced.

Where is the dividing line at which a law taxing oleomargarine loses its character as a revenue measure and becomes a regulation? Is it the point at which it is no longer possible to sell it in the market at butter prices and reap a good profit? If this be the true test, then the rate of tax which may be imposed will shift from time to time with the price of butter, a certain rate of tax being constitutional one day and unconstitutional the next. Oleomargarine, under its disguise, while also competing with the butter produced on the farm, competes especially with creamery butter. To compete with the butter from the farm it is packed in tubs as the farm butter generally is packed; in competing with creamery butter it is generally packed in prints and rolls

as that article generally is packed. Now it has occurred (and may occur again) that during the summer months farm butter has retailed in the market at from 10 to 12 cents per pound. Suppose that in order to secure a sufficient market for their product it would be necessary for the oleomargarine manufacturers to compete with farm butter at these prices, and they should insist that this could not be done if, say, the old rate of tax, 2 cents per pound, were exacted. Might they not insist, therefore, with equal force, that a tax of 2 cents per pound was unconstitutional because it made it impossible for them to sell their products at butter prices? If this law is to be declared invalid because the tax, in the opinion of the court, is excessive, at what rate may Congress constitutionally fix the tax?

The special brief for Cliff.

It is asserted in the brief filed by Mr. Harlan (p. 8) that to be oleomargarine within the terms of the act a given compound must have three characteristics: (*a*) It must be composed of some of the substances named in section 2 of the act; (*b*) it must be "made in imitation or semblance of butter;" and (*c*) when "made in imitation or semblance of butter," it must be "calculated or intended to be sold as butter or for butter." All three of these characteristics, it is said, must coexist in any compound before it can be said to be oleomargarine.

This proposition is untenable. To reach that conclusion counsel must read into the act something that is not there; or, he must give to the disjunctive conjunction "OR" the same meaning as the conjunction "AND." The language of section 2 is:

> "That for the purposes of this act," * * * "all substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine," etc., * * * "made in imitation or semblance of butter, OR when so made, calculated, or intended to be sold as butter or for butter," "shall be known and designated as oleomargarine."

If the act had read, "made in imitation or semblance of butter, AND, when so made, calculated or intended to be sold as butter or for butter," then there would be some force in the claim. It is apparent that in using the word "OR," Congress intended that any of the named substances "made in imitation or semblance of butter" should be liable to the tax irrespective of whether it was made or sold or intended to be sold as oleomargarine or as butter. In other words, the sale, or the intent to sell, the compound "as butter or for butter," is not necessary to subject the compound "made in imitation or semblance of butter" to the payment of the tax.

The word "OR" is a disjunctive conjunction coordinating two or more words or clauses, each one of which in turn is regarded as excluding consideration of the other or others (Century Dictionary).

The position taken here by counsel for the Government is in full accord with the opinion of Attorney-General Garland of October 18, 1886 (18 Opin., 489), and the opinion of the Commissioner of Internal Revenue of January 12, 1903. The opinion of Judge Grosscup (125 F. R., 331) is in line with these rulings.

If it be true, as contended for by opposing counsel, that in order to subject oleomargarine to the payment of the tax it must have been made in imitation or semblance of butter, **AND** made with the intention to sell as butter, then it was idle for Congress ever to have passed the law; for no manufacturer of oleomargarine would admit that he made the article in imitation or semblance of butter for the purpose or with the intention of selling it "as butter or for butter." The burden would, in all cases, be on the Government to prove that intent before it could subject a single ounce of oleomargarine to the payment of the tax. It would be a futile and meaningless tax law.

As to the second proposition advanced by Mr. Harlan, it is sufficient to say that butter, as is well known, varies in color from the winter color (white with the faintest tinge of yellow) to June yellow. Any product, therefore, in imitation or semblance of butter of any shade of yellow, ranging from the winter to the June color, or more highly colored, is subject to the tax. As we have pointed out, the original oleomargarine was made out of the leaf or caul fat of cattle, which gave it a

somewhat resemblance in color and consistency to that of winter butter.

Mr. Harlan's next proposition is, in effect, that since vegetable oil is a statutory ingredient of oleomargarine, the use of any vegetable oil in the manufacture of oleomargarine, no matter how small in quantity or how great a coloration it imparts to the product, and no matter how deleterious to the wholesomeness of the product, does not constitute an artificial coloration within the meaning of the statute. The language of the statute is:

> All mixtures and compounds of tallow, beef fat, suet, lard, lard oil, VEGETABLE-OIL ANNOTTO, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter.

The court will observe that the words "vegetable" and "oil" are connected by a hyphen and that there is no comma between the word "oil" and the word "annotto;" and then follow the words "and other coloring matter."

It seems then that Congress, in using the term "vegetable-oil annotto," did not intend to class that product with the fatty substances, but with the coloring elements. The language means that "annotto" when produced from the arnotto tree (Century Dictionary) may be used as a coloring, but *not* when manufactured from coal-tar products. Originally annotto was produced wholly from the fruit of the arnotto tree; it is now also derived from coal-tar products.

The Government does not contend that the effect of the statute is to prohibit the use of substances other than those named, or that vegetable oils may not properly be used in the manufacture of oleomargarine. Some vegetable oils are, in fact, used. Whether they were being used in 1886, at the time of the passage of the original act, counsel is not now advised. But the Government does not concede that *all* vegetable oils may be used. What the Government claims is, that vegetable oils must be of such character as to be naturally adapted for use as food in the form in which used; they must be wholesome and palatable irrespective of the quantity used; otherwise they can not be said to be a *natural* ingredient.

Obviously there are many vegetable oils which are not fit for this use, and when unpalatable or unwholesome the manufacturers certainly would avoid them as ingredients, in large or small quantities, because they would injure the sale of the product. Similarly the commercial motive would prevent them from using an ingredient which is too costly, or unavailable for any other reason, like limited amount of supply. So, when they use a vegetable oil ingredient which is unpalatable or unwholesome, or partially deleterious, in such small quantities as to be negligible in its substantive effect, and the article gives a color, then not only is the intention clear, but the artificiality and the consequent violation of

the law are equally clear. That the article is a *natural* substance in general, produced by or from nature, instead of compounded by art, does not make it any the less artificial *quoad* the coloring of oleomargarine. It is probable that well-known artificial colors are "natural" in the same sense, and are harmless. I have always understood that they are made from carrots and other vegetable materials. This is what "vegetable-oil annotto" means. It is only the conjunction of the right color, for the forbidden use, in small quantities, with the vegetable oil origin, which leads the manufacturer to use palm oil, and permits Mr. Harlan to make his ingenious but untenable argument.

I have no doubt that many experiments have been made and are in progress to find an oil which may be used as a fit and natural food ingredient and which, when so used, will impart the desired color. It is obvious that many factors condition the problem—cost, supply, substantive effect upon the product, color, and the right *degree* as well as "*primary*" *relations* thereof (*i. e.*, between red, orange, yellow), because unless the color is concentrated the oil proportion would overbalance the solid elements and the necessary hard consistency would not be attained. A mere *yellow* oil like peanut oil, otherwise desirable, would not do.

So that the manufacturers in seeking to meet the law, or rather to evade it, take this highly colored and unfit vegetable oil, with an excess of

deleterious acids even when refined, and, finding in accordance with the laws of color that a dilution of red and orange produces yellow, and that this substance used in small quantities in oleomargarine yields that color, and does no injury (as it is claimed), because the deleteriousness is minute, assert that they are using a proper ingredient and that the color thereby imparted is not artificial. It is impossible to sustain this argument upon any reasonable view of the facts or any proper conception of legal logic.

It will be recalled that pink, in the New Hampshire case, was called a *discoloration*. Is not yellow also a discoloration of *oleomargarine?* Suppose a proper oil ingredient naturally gave a pink tinge, would that color, then, be discoloration?

Let us examine the question of the nature of palm oil, as shown by the evidence and by science. Is it really a *natural* ingredient of oleomargarine as claimed by opposing counsel? On page 97 of the brief for the Government the character of the oil is pointed out, the statement being based upon the finding of the Commissioner, the statements found in the works of the two chemists there mentioned and the testimony of the chemist Hoskins. Counsel asserts that this claim that palm oil is deleterious to health (brief, p. 12) is unfounded unless the *ex parte* statement of the Commissioner of Internal Revenue be regarded as evidence. The finding of that officer is in evidence (Cliff record, p. 9) and it is the finding

of an officer upon an official investigation while acting within the scope of his authority (section 14). This finding was made after investigation, with the aid of expert chemists provided by law, of the samples of palm oil submitted by Moxley, the manufacturer of the oleomargarine involved in this case; and we submit that that finding, under the law, is conclusive.

It is said the Government has overlooked the testimony of Professor de la Fontaine (Cliff record, p. 12). This witness states that palm oil "is quite as digestible as any other of the fats that we use for food," and that after being *refined* there would be no objection in using it in large proportions; but he understands the process of refining does away with most of the flavor and color, and that ultimately (not at present) refined palm oil will find its way on the market as a regular article of food; perhaps not in this country where we have lard in plenty and other fats, *but in other countries.* This is as much as to say that at present it has not found its way on the market as a *natural* ingredient of oleomargarine, but that in the future it may do so in countries where other fats are more expensive. I suppose he refers to east Africa, but we are not concerned with tastes and notions of hygiene there.

But the chemist Hoskins (Cliff record, pp. 10, 11) is not so sure about the wholesomeness and future use of palm oil. His statement is, that in his opinion "there is nothing deleterious or un-

wholesome in the use of palm oil in the proportion in which it was used in this formula"—that is, less than 1 per cent. That limitation implies that if used in a larger quantity it would be deleterious and unwholesome.

Referring to the works of the chemists, to which we have called attention, we find the following respecting palm oil (Lewkowitsch's "Chemical Anal. of Oils," 2d ed., p. 517):

> Palm oil is characterized by the *very* large amount of free fatty acids it contains. Even in the fresh state the proportion of fatty acids calculated as palmitic acid amounts to 12 per cent, and may, in older samples, reach as much as 100 per cent; in other words, the splitting up of the glycerides may become complete [that is, become acids]. I have found in a large number of commercial palm oils from 50 to 70 per cent of free palmitic acid. * * *
>
> The coloring matter of palm oil is bleached by exposure to air, or by heat, or by chemicals, such as chromic acid, etc. The two latter processes are adopted in practice for preparing bleached palm oil, which is almost colorless. By "chemical" bleaching the odor is destroyed, but it is not affected by heating to a high temperature. The coloring principle and the odor are not destroyed by saponification with alkalis or lime (candle manufacture); acid saponification, however (p. 746), destroys both.

See also Allen's "Chemical Organic Analysis," vol. 2, part 1 (3d ed.), page 161.

Apparently palm oil is more available as a material for soap and candles than for food.

From this it will be seen that the only proper way to refine the oil and render it wholesome is by chemical process. This destroys the odor *and the color* (the "desired" property) and perhaps takes away the offensive taste.

Evidently, then, the palm oil used in the oleomargarine involved in the Cliff case had not been refined in this proper sense, else it would not have imparted the color.

It seems useless to pursue the argument further. It is clear from the evidence and from the chemical authorities cited that palm oil in the condition in which it was introduced into this oleomargarine can not be regarded as a food product or as a natural or statutory ingredient of oleomargarine; and that, until chemically refined, at least, is unfit for human consumption. Having used only a sufficient quantity to give the product the "desired" color, the conclusion is irresistible that it was used solely for purposes of coloration and did not form, and was not intended to form, any part of the fatty ingredients; and that, therefore, such use constituted an artificial coloration within the meaning of the statute.

Mr. Harlan invokes the same authorities under the customs law which are quoted in Mr. Guthrie's

reply brief. If Mr. Harlan's argument were sound that on the test of the law itself palm oil is not an artificial coloration and therefore the Commissioner under his statutory authority can not decide contrary to the clear effect of the law, nor add anything to its terms, then his conclusion drawn from these decisions, that by a department regulation (or by executive decision) a law can not be contravened or enlarged, would be sound. But I submit that his conclusion falls with his premise, and that my comment (*ante*), on the decisions which are cited, embodies the true principle of this case, namely, that there is no defect or omission in the law which the taxpayer can legally take advantage of, and that the Commissioner is merely effectuating its plain terms and meaning and is not attempting through his finality of decision either to set the law aside, or to add to its scope, or to supply its omissions. He is doing nothing more than ascertaining facts under the law, and applying the law to the facts found.

Final suggestions.

Counsel, in reply to the suggestion from the bench that his argument against the constitutionality of any legislation which would destroy or greatly injure and embarrass a legitimate industry involves the necessity of contending that State legislation prohibiting or regulating the manufacture and sale of oleomargarine is unconstitutional, although this court determined otherwise

in the *Capital City Dairy* case, nevertheless maintained that proposition; and in seeking to illustrate it, and to enforce it, further claimed that even under the unlimited power over interstate commerce Congress could not prohibit an article from entering commerce and in that way injure or destroy its value or the business producing it. Is that proposition sound? And is it possible to maintain it in view of the decisions of the court? Of course there is a great difference between legitimate and illegitimate commerce, or between a legitimate and an illegitimate article of commerce. But the court has rendered no decision which would hamper the discretion of Congress in determining whether *any* particular article, whatever its character, should be excluded from commerce. At least it is certain that Mr. Guthrie's argument on this point necessitates the view that State legislation *prohibiting* the manufacture and sale of oleomargarine is unconstitutional.

The correlation between Federal and State powers which I endeavored to point out is this: The decisions of the court show that the Federal power must not encroach upon the State domain, nor the State power upon the Federal domain; that the State power of internal police must be left untrammeled by the one authority as well as the Federal power over interstate commerce, for instance, by the other; that the plain prohibitions respectively restraining either authority can not be evaded covertly or indirectly—such an *effect* of a

law is forbidden, whatever its guise; but that, along the line where the two powers approach each other, where under the particular facts the demarcation is not definite and clear, a *bona fide* exercise of power in either domain is not invalid because its consequences incidentally affect the other domain.

So in the *Plumley case*, for example, where, as in other State cases, the oleomargarine interests were urging the reverse of their proposition in this case and contending that the State law was a regulation of Federal commerce, the court approved the statement in *Sherlock* v. *Alling* (93 U. S., 99, 103), that legislation may affect commerce in many ways without constituting a regulation of it within the meaning of the Constitution, when the legislation is not directed against commerce and only indirectly and remotely affects it.

I suppose that principle applies to Federal legislation in its bearings upon *intra* State affairs and commerce as well as to State legislation in its effect upon *inter* State commerce.

In *Louisville and Nashville R. R.* v. *Kentucky* (161 U. S., 677) it was held that the State prohibition of certain railway consolidations was within the State police power. It was said that Congress would not have the power to authorize such consolidations in defiance of State legislation. Is there not a difference between such an authority or some prohibition similarly encroaching on State power, and a legitimate Federal law asserting a

Federal attribute or object, like a Federal tax command? The opinion in that case fully sustained the State police power when "invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests." How do the present cases interfere with that principle? Is it true because State laws have been sustained as *not* constituting restraint or interference *quoad Federal* power, or because Federal statutes may unlawfully run into the State preserve, that *this* Federal *tax* law, actually following and aiding indirectly the universal policy and laws of the States, must be stricken down?

The actual situation must be recognized. In the case of a State law not antagonized but aided by the effect of a Federal tax law, or in the case of non-action by a State, can it be successfully urged that a dormant State power, possible to exert in opposition to the general tendency of legislation throughout the country and to the indirect effect of the Federal tax law, although not actually so exerted, can control a power of the Government created by the Constitution? In the present case the State police power is not dormant except in the sense that the States might reverse their existing oleomargarine policy. The State power is not dormant; it has acted; but could a dormant and potential local authority thus absolutely control the Federal power of taxation?

The *Knight* case held (156 U. S., 1) that a monopoly of *production* did not restrain interstate *commerce*. That was because production is a matter wholly reserved to State control, and for that reason the indirect effect upon commerce among the States could be ignored. I presume if the interstate-commerce power, also exclusive, indirectly affected production, its legitimate exercise would be valid none the less, and for the same reason. It was held to be valid where it thus affected the right of contract,—also a matter of State control, in the Trans-Missouri and Joint Traffic cases. (166 U. S., 290; 171 U. S., 505.)

In other words, the argument is correlative—a rightful power legitimately exercised, either in the national or State field, is not invalidated because it may somewhat affect another subject falling under the opposite authority.

Here both sovereignties have the particular power—that is, of taxation—and one, the State, has the peculiar and exclusive authority of internal police regulation. Is the Federal tax law invalidated because of an indirect effect upon the industry within the State, especially when the law falls in with the State regulation? The case is sharply contrasted with the situation as to liquor, where the Federal tax law does not recognize local prohibitions, but permits and authorizes the sale and issue of Federal licenses in States which have forbidden the traffic entirely.

In fine, there is nothing in the case but the assertion that the *amount* of the tax invalidates it. In connection with that claim I desire to recall to the court the terms of the grant of power, explicitly and exclusively (among all the grants) recognizing the object of general welfare, which therefore enforces the taxing grant in a peculiar sense. If this amount is too great to be constitutional, where and how shall the line be drawn?

One may readily quote from the great announcements of the court, or from the utterances of distinguished public men weighty truths regarding the objects of governments, the exercise of their powers, and the principles of constitutions. The doctrines for which the Government stands in this case are as solemn, as sound, and as completely established as any principles which this court has settled in construing the Constitution.

And so it is appropriate to recall to the court, as a comment upon Mr. Guthrie's argument and the grave words of his conclusion, the impressive language of Chief Justice Marshall at the close of the remarkable opinion which he delivered in *Gibbons* v. *Ogden:*

> Powerful and ingenious minds, taking as postulates that the powers expressly granted to the Government of the Union are to be contracted by construction to the narrowest possible compass, * * * may, by a course of well-digested but refined and metaphysical reasoning, founded on these premises,

> explain away the Constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind could pursue its own course, none would be perceived.

I respectfully submit that, regarding the constitutional question at least, and in the *McCray* case, if not in the Chicago cases, there is no objection on the score of jurisdiction; and that the judgments below should be affirmed.

HENRY M. HOYT,
Solicitor-General.

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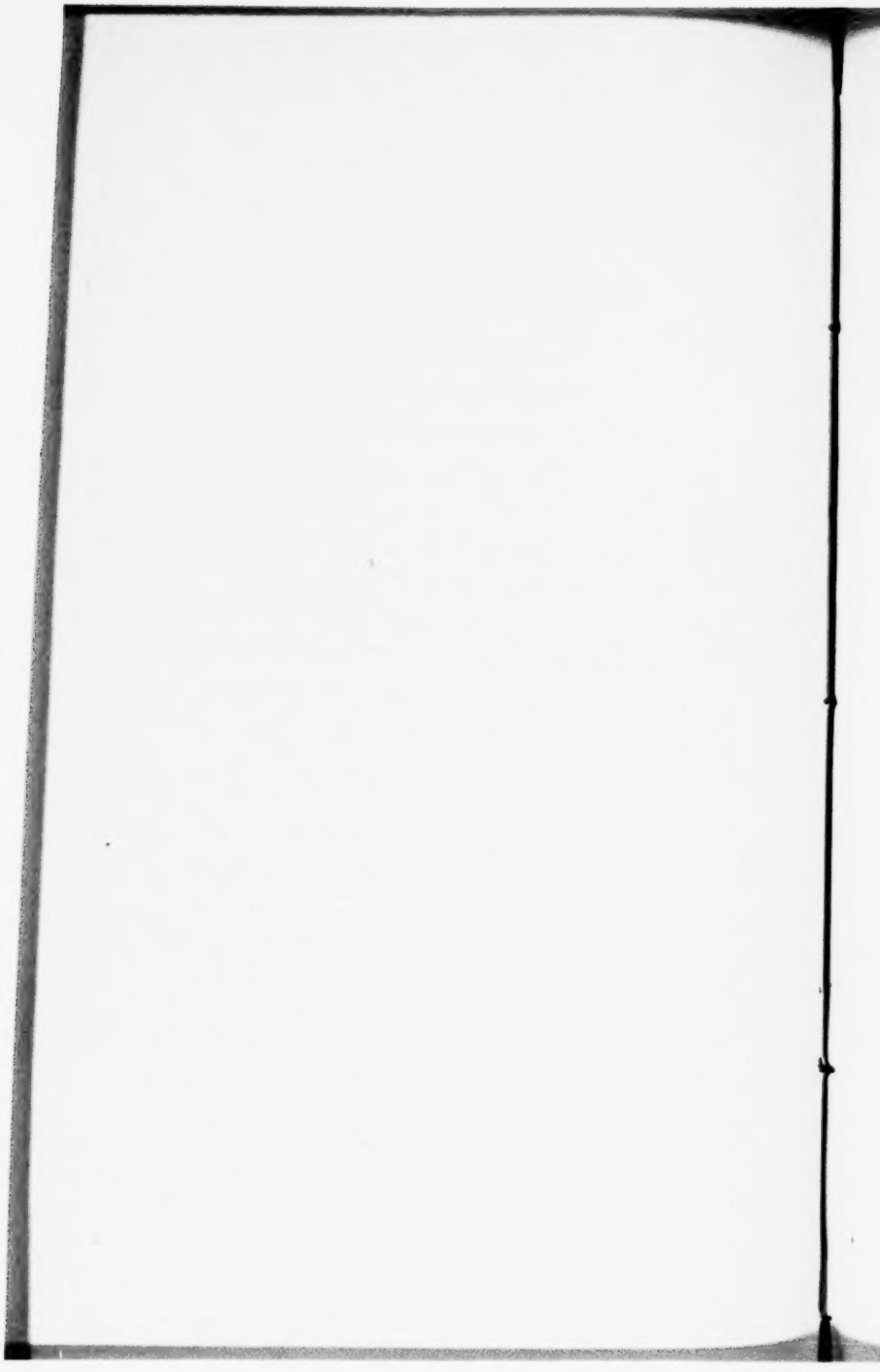

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Supreme Court of the United States.

Nos. 222 and 223.—October Term, 1903.

Frederick J. Schick, Plaintiff in Error, 222 *vs.* The United States. William Broadwell, Plaintiff in Error, 223 *vs.* The United States.	In error to the District Court of the United States for the Northern District of Illinois.

[May 31, 1904.]

Mr. Justice Brewer delivered the opinion of the Court.

The constitutionality of the Oleomargarine legislation having been settled in *McCray* v. *United States*, just decided, there is in these two cases only a single question. The plaintiffs in error were severally prosecuted by information in the District Court of the United States for the Northern District of Illinois, under section 11 of the act of August 2, 1866, (24 Stat. 209,) which reads: "That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offence."

In each case the parties in writing waived a jury and agreed to submit the issues to the court. Judgments were entered in favor of the United States and their collection ordered by only the civil process of execution. That the defendants had failed to comply with the section was proved. Indeed, it was not seriously disputed, the defence resting only on the alleged unconstitutionality of the act. The waiver of a jury was not assigned as error, nor referred to by counsel at the hearing before us, either in brief or argument. The question of its effect upon the judgment was suggested by this court, and briefs were called for from the respective parties. Such briefs have been filed, and both agree that the waiver of a jury did not invalidate the proceedings. Notwithstanding this, the fact of the waiver appears in the record.

We entertain no doubt that the parties could rightfully make such a waiver, and that the judgments are in no way invalidated thereby. It will be noticed that the section characterizes the act prohibited as an offence, and subjects the party to a penalty of fifty dollars. So small a penalty for violating a revenue statute indicates only a petty offence. It is not one necessarily involving any moral delinquency. The violation

may have been the result of ignorance or thoughtlessness, and must be classed with such illegal acts as acting as an auctioneer or peddler without a license, or making a deed without affixing the proper stamp. That by other sections of this statute more serious offences are described and more grave punishments provided does not lift this one to the dignity of a crime. Not infrequently a single statute in its several sections provides for offences of different grades, subject to different punishments, and to prosecution in different ways. In some States in the same act are gathered all the various offences against the person, ranging from simple assault to murder, and imposing punishments from a mere fine to death. This very statute furnishes an illustration. By one clause the knowingly selling of adulterated butter in any other than the prescribed form subjects the party convicted thereof to a fine of not more than one thousand dollars and imprisonment for not more than two years. An officer of customs violating certain provisions of the act is declared guilty of a misdemeanor and subject to a fine of not less than one thousand dollars nor more than five thousand dollars, and imprisonment for not less than six months nor more than three years. Obviously these violations of certain provisions of the statute must be classed among serious criminal offences, and can be prosecuted only by indictment, while the violations of the statute in the cases before us were prosecuted by information. The truth is, the nature of the offence and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offences, whether among crimes or misdemeanors. Clearly both indicate that this particular violation of the statute is only a petty offense.

In such a case there is no constitutional requirement of a jury. In the third clause of section 2, Article III, of the Constitution it is provided that "the trial of all crimes, except in cases of impeachment, shall be by jury;" and in Article VI of the amendments, that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." If there be any conflict between these two provisions the one found in the amendments must control, under the well-understood rule that the last expression of the will of the lawmaker prevails over an earlier one. But that in the body of the Constitution does not include a petty offence like the present. It must be read in the light of the common law. "That," said Mr. Justice Bradley, in *Moore* v. *United States*, (91 U. S. 270, 274,) referring to the common law, "is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many acts of Congress could not be understood without reference to the common law." Again, in *Smith* v. *Alabama*, (124 U. S. 465, 478,) is this declaration by Mr. Justice Matthews: "The inter-

pretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." In *United States* v. *Wong Kim Ark*, (169 U. S. 649, 654,) Mr. Justice Gray used this language:

"In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. (*Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyd* v. *United States*, 116 U. S. 616, 624, 625; *Smith* v. *Alabama*, 124 U. S. 465.)" See also *Kepner* v. *United States*, *ante*, ; 1 Kent Com. 336.

Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution, it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it. In this treatise, vol. 4, p. 5, is given a definition of the word "crimes:"

"A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms; though in common usage the word 'crimes' is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only."

In the light of this definition we can appreciate the action of the convention which framed the Constitution. In the draft of that instrument, as reported by the committee of five, the language was "the trial of all criminal offences . . . shall be by jury," but by unanimus vote it was amended so as to read "the trial of all crimes." The significance of this change cannot be misunderstood. If the language had remained "criminal offences," it might have been contended that it meant all offences of a criminal nature, petty as well as serious, but when the change was made from "criminal offences" to "crimes," and made in the light of the popular understanding of the meaning of the word "crimes," as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offences. But we need not go beyond the express rulings of this court. In *Callan* v. *Wilson*, (127 U. S. 540,) reference was made to many decisions of State courts, holding that the trial of petty offences was not within any constitutional provision requiring a jury in the trial of crimes, and on page 557 it was said:

"Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an im-

partial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged."

By section 563, R. S., the District Courts are given jurisdiction "of all crimes and offences cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital." There is no act of Congress requiring that the trial of all offences shall be by jury, and a court is fully organized and competent for the transaction of business without the presence of a jury. There is no public policy which forbids the waiver of a jury in the trial of petty offences. On the contrary, by section 44 of the Code of Law for the District of Columbia, Congress provided, in respect to the Police Court, that—

"In all prosecutions within the jurisdiction of said court in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall in open court expressly waive such trial by jury and request to be tried by the judge, in which case the trial shall be by such judge, and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury. In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last named cases wherein the fine or penalty may be $50 or more, or imprisonment as punishment for the offence may be thirty days or more, the accused shall demand a trial by jury, in which case the trial shall be by jury."

And it is a well-known fact that in many Territories organized by act of Congress the legislature has authorized the prosecution of petty offences in the police courts of cities without a jury.

But if there be no constitutional or statutory provision or public policy requiring a jury in the trial of petty offences, upon what ground can it be contended that a defendant therein may not voluntarily waive a jury? Can it be that a defendant can plead guilty of the most serious, even a capital, offence, and thus dispense with all inquiry by a jury, and cannot when informed against for a petty offence waive a trial by jury? Article six of the amendments, as we have seen, gives the accused a right to a trial by jury. But the same article gives him the further right "to be confronted with the witnesses against him . . . and to have the assistance of counsel." Is it possible that an accused cannot admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the

right to enjoy. Authorities in the State courts are in harmony with this thought. In *Commonwealth* v. *Daley*, (12 Cush. 80,) the defendant in a misdemeanor case waived his right to a full panel and consented to be tried by eleven jurors, and this action was sustained by the Supreme Court of Massachusetts. Chief Justice Shaw, delivering the opinion of the court, said (p. 83): "He may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court." The same doctrine was laid down in *Murphy* v. *Commonwealth*, (1 Met. [Ky.] 365;) *Tyra* v. *Commonwealth*, (2 Met. [Ky.] 1,) and in *State* v. *Kaufman*, (51 Ia. 578.) In *Connelly* v. *State*, (60 Ala. 89,) a statute authorizing the waiver of a jury was sustained. The same rule was made in *State* v. *Worden*, (45 Conn. 349,) which was a case of a felony. See also *People* v. *Rathbun*, (21 Wend. 509, 542.)

We are of opinion that the waiver of a jury by the defendants in these cases and the consent to trial by the court was not in conflict with law, and the judgments are, therefore,

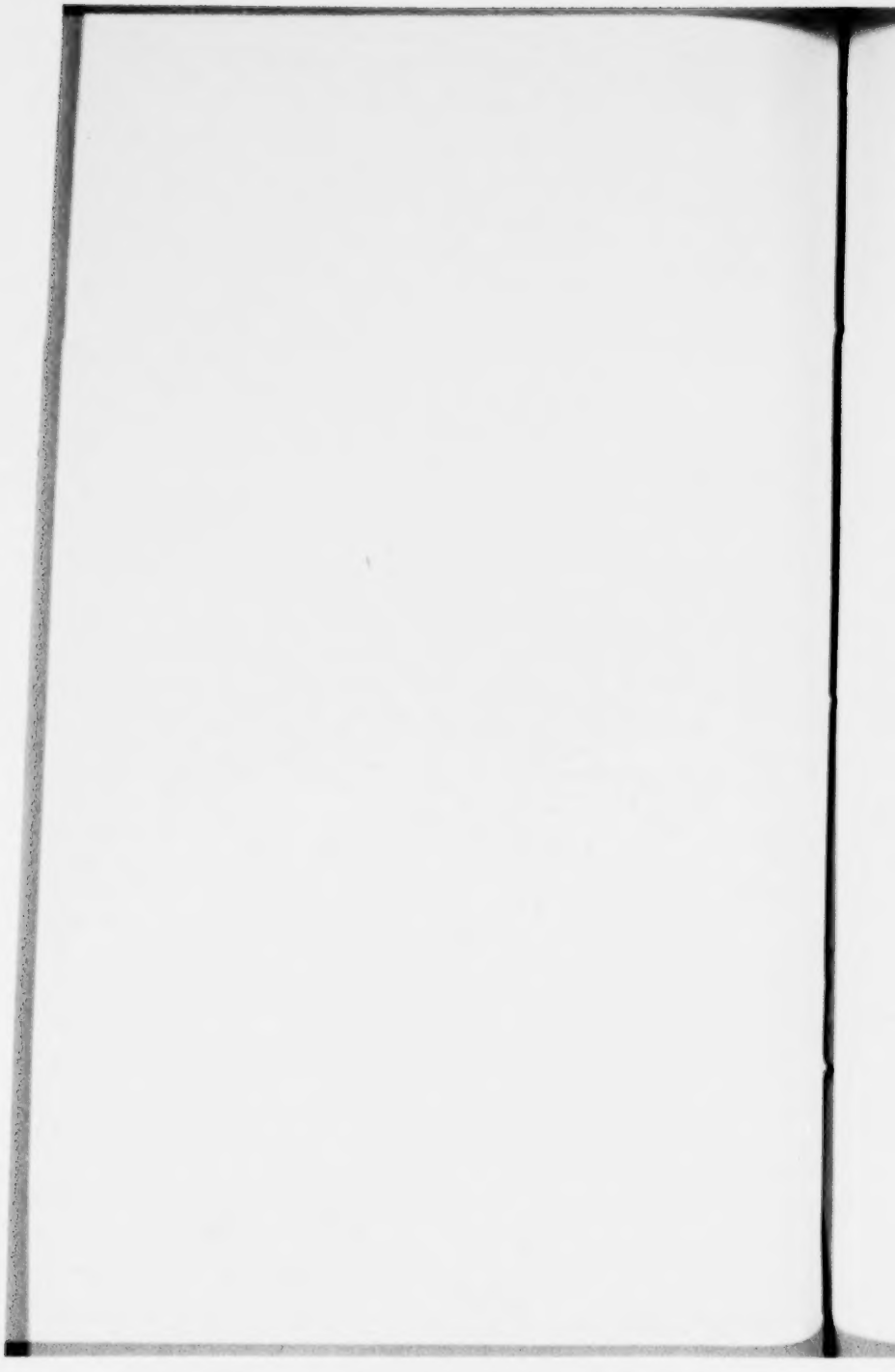
Affirmed.

The CHIEF JUSTICE, Mr. Justice BROWN and Mr. Justice PECKHAM concur in the views expressed in this opinion, although they dissent from the judgments on the ground of their dissent in No. 301.

True copy.

Test:

Clerk Supreme Court, U. S.



Supreme Court of the United States.

Nos. 222 and 223.—October Term, 1903.

Frederick J. Schick, Plaintiff in Error, 222 vs. The United States.	In error to the District Court of the United States for the Northern District of Illinois.
William Broadwell, Plaintiff in Error, 223 vs. The United States.	

[May 31st 1904.]

Mr. Justice Harlan dissenting.

These are criminal prosecutions based on the act of Congress of August 2d 1886, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," supplemented by the act of October 1st 1890, and amended by the act of May 9th 1902. 24 *Stat.* 209, *c.* 840; 26 *Stat.* 621, *c.* 1244, *s.* 41; 32 *Stat.* 193, *c.* 784.

The informations against Schick and Broadwell were substantially of the same character. Each charged that the defendant, a retail dealer in oleomargarine, unlawfully and knowingly purchased and received for sale certain oleomargarine which had not been stamped according to law.

The parties, in writing, waived a jury, and agreed to submit the issues to the court. The accused, in each case, pleaded not guilty. Evidence having been introduced, the defendant in each case moved the court to render a verdict and judgment of not guilty and that he be discharged, upon the ground that the above act of Congress, as amended, was in contravention of the Constitution of the United States in that it deprived the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law; was an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States; invested an inferior executive officer with the power finally and arbitrarily to determine judicial questions concerning property rights; and so arbitrarily discriminated against oleomargarine in favor of butter as to be repugnant to the fundamental principles of equality and justice that were inherent in the Constitution.

In each case the motion was overruled, the defendant excepting. Motions for new trial and in arrest of judgment having been severally overruled, the court, *no jury having been empanelled*, found the defendant, in each

case, guilty, and adjudged that he pay a fine of $50 and costs, and that execution issue therefor. From those judgments the present writs of error were prosecuted.

The assignments of error here present the same questions of constitutional law that were raised on the motion to render judgment for the defendant; and, in addition, they question the action of the trial court in striking out and refusing to consider certain evidence.

Upon the face of the record the question arises whether the court below, without the aid of a jury, had jurisdiction to ascertain the facts, and, finding the defendants severally guilty of the offense charged, to impose upon each the fine prescribed by the statute.

I. That this is a criminal prosecution, and that the mode of procedure must be determined by the established rules governing the conduct of trials in criminal cases, is in my judgment not to be doubted. The record itself describes the information as a *criminal* information, and the case was tried as if it were a criminal prosecution. It never occurred to the trial court that it was a prosecution of any other kind. It is true that the act provides that all fines, penalties and forfeitures imposed by it may be recovered in any court of competent jurisdiction. § 19. But it is evident from the entire act that it makes all the violations of the provisions imposing a fine, or fine and imprisonment, or fine or imprisonment, criminal offenses to be punished in such mode as was appropriate or allowable by the law of criminal procedure. Throughout the act, when a fine is imposed, the doing of the thing forbidden is described as an "offense." If a person carries on the business of a manufacturer of oleomargarine, without having paid the special tax, he is subject, besides being liable to pay the special tax, to be fined not less than $1,000 and not more than $5,000; if he carries on the business of a wholesale dealer in oleomargarine without having paid the special tax therefor he is subject, besides being liable for the special tax, to be fined not less than $500 nor more than $2,000; and if he carries on the business of a retail dealer in oleomargarine, without having paid the special tax, he may be fined not less than $50 nor more than $500 for each and every *offense*. § 4. Every person who knowingly sells or offers for sale, or delivers or offers to deliver any oleomargarine in any other form than in new wooden or paper packages as described, or who packs in any package any oleomargarine in a manner contrary to law, or who falsely brands any package or affixes any stamp on any package denoting a less amount of tax than that required by law, "may be fined for each *offense* not more than $1,000, and be imprisoned not more than two years." § 6. Every manufacturer of oleomargarine who neglects to affix the required label to a package containing oleomargarine made by him, or sold or offered for sale by or for him, and every person who removes any label so affixed may be "fined $50 for each package in respect to which such *offense* is com-

mitted." § 7. Every officer of customs who permits imported oleomargarine "to pass out of his custody or control without compliance by the owner or importer thereof with the provisions of this section relating thereto, shall be guilty of a *misdemeanor* and shall be fined not less than $1,000 nor more than $5,000, and imprisoned not less than six months nor more than two years." § 10. Any person who wilfully neglects or refuses, when emptying a stamped package containing oleomargarine, to utterly destroy such stamps, "shall for each *offense* be fined not exceeding $50 and imprisoned not less than ten days nor more than six months. And any person who fraudulently gives away or accepts from another, or who sells, buys, or uses for packing oleomargarine any such stamped package, shall for each such *offense* be fined not exceeding $100 and be imprisoned not more than one year." § 13. Any person who wilfully removes or defaces the stamps, marks or brands on packages containing oleomargarine taxed as provided, is guilty "of a *misdemeanor*, and shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars, and by imprisonment for not less than thirty days nor more than six months." § 15. Whenever any person engaged in carrying on the business of manufacturing oleomargarine who defrauds, or attempts to defraud, the United States of the tax on the oleomargarine produced by him, or any part thereof, forfeits the factory and manufacturing apparatus used by him, and all oleomargarine and all raw material for the production of oleomargarine found in the factory and on the factory premises, and "shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years." § 17.

These sections are to be looked at in connection with section 11, on which this prosecution is based. That section provides "That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law, shall be liable to a penalty of fifty dollars for each such *offense*."

It is true that the word "penalty" is used in several sections of this act. But it is not to be conclusively inferred therefrom that the offense described was not a crime, within the strictest meaning of that word. Referring to the words "penalty," "liability," and "forfeiture," this court has said: "These words have been used by the great masters of Crown law and the elementary rulers as synonymous with 'punishment,' in connection with crimes of the highest grade. Thus, Blackstone speaks of criminal law as that 'branch of jurisprudence which teaches of the nature, extent and degrees of every crime, and adjusts to it its adequate and necessary penalty.' Alluding to the importance of the department of legal science, he says: 'The enacting of penalties to which a whole nation shall be subject should be calmly and maturely considered.' Referring to the unwise policy of

inflicting capital punishment for certain comparatively slight offenses, he speaks of them as 'these outrageous penalties,' and frequently refers to laws that inflict the penalty of death." *United States* v. *Reisinger*, 128 *U. S.* 398, 402. So, in *Huntington* v. *Attrill*, 146 *U. S.* 657, 667, after referring to the maxim of international law (*The Antelope*, 10 *Wheat.* 66, 123,) that "the courts of no country execute the penal laws of another," and observing that there was great danger, when interpreting that maxim, of being misled by the different shades of meaning allowed to the word "penal" in our language, this court said: "In the municipal law of England and America the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State for a crime or offense against its laws. . . Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon." Besides the act throughout uses the words "fine," and "fined"—words which, in their primary sense, import the punishment of a person convicted of crime.

I cannot doubt, after a scrutiny of the entire act, that every offense prescribed by it and for which a fine is imposed, was intended to be made and is a criminal offense—a crime against the United States—to be punished as such. Certainly the offenses prescribed in sections four, six, seven, ten, thirteen, fifteen and seventeen are crimes against the United States. If that be so, surely the offense prescribed in section 11 is a crime and not a mere penalty recoverable only by some form of proceeding of a civil nature. This view is substantially conceded by the Solicitor General when he says that "in view of the word 'offense' in section 11 of the oleomargarine act, there is ground for saying that the penalty which it provides was imposed as a fine for the violation of what is made a misdemeanor." If the United States could have proceeded in some form of civil action to recover the fine imposed by that section, it has not done so. It chose to proceed by criminal information, and the accused pleaded not guilty of the crime charged.

II. So far it has been my object only to show that the offense charged was a *crime* against the United States. I now inquire as to the mode in which it may be legally ascertained whether an accused, pleading *not guilty*, has committed the crime charged against him? Has the law designated any particular tribunal or prescribed any special mode for trying the issue as to his guilt? The words of the Constitution upon this subject are clear and explicit. They leave no room for interpretation. Its express mandate is that "the *trial* of *all* crimes, except in cases of impeachment, *shall be* by jury." *Const., Art.* 3. When the Constitution was placed before the People for adoption or rejection many deemed those

words, explicit as they were, inadequate to secure all the benefits of a jury trial as it existed at common law.

It is suggested that if any conflict exists between the absolute requirement in the original Constitution, (Art. 3, § 2,) that the "trial of all crimes, except in cases of impeachment, *shall* be by jury," and the provision in the Sixth Amendment, that the accused, in every criminal prosecution, "shall *enjoy the right* to a speedy and public trial, by an impartial jury," &c., the latter, having been last adopted, must control. But there is no such conflict. Those who opposed the acceptance of the Constitution said, among other things, that the words of that instrument, strictly construed, (Art. 3, § 2,) admitted of a secret trial, or of one that might be indefinitely postponed to suit the purposes of the Government, or of one taking place in a State or district other than that in which the crime was committed. The framers of the Constitution disclaimed any such evil purposes; but in order to meet the objections of its opponents, and to remove all possible ground of uneasiness on the subject, the Sixth Amendment was adopted, in which the essential features of the trial required by section 2 of Article 3 are set forth. In other words, the trial required by that section is the trial referred to in the Sixth Amendment. And the jury referred to in both the original Constitution and in the Amendments was, the authorities all agree, the historical jury of the common law, consisting of twelve persons, no more and no less, whose unanimous verdict was necessary to conviction. *Thompson* v. *Utah*, 170 *U. S.* 343, 349; 2 *Hale's P. C.*, 161; 1 *Chitty's Cr. Law*, 505; 2 *Blackstone*, 719; *Coke, Elizabeth*, 654. Mr. Justice Story said: "The Constitution of the United States has exhibited great solicitude on the subject of the trial of crimes, and has declared that the trial of all crimes, except in cases of impeachment, shall be by jury; and has in some cases prescribed and in others required Congress to prescribe the place of trial. And certain amendments of the Constitution, in the nature of a bill of rights, have been adopted, which fortify and guard this inestimable right of trial by jury." *United States* v. *Gibert*, 2 *Sumner*, 19, 37. See also *Capital Traction Co.* v. *Hof*, 174 *U. S.* 1; *Natal* v. *Louisiana*, 139 *U. S.* 621, 624; 4 *Black. Com.* 280; 1 *Stephens' History of the Criminal Law*, 123.

The contention in the present prosecutions is that although the positive constitutional injunction that the trial of all crimes shall be by jury furnishes an inflexible rule that may not be ignored in cases of felony, that rule, even where the accused pleads not guilty, may be disregarded altogether in a trial for a misdemeanor, provided he consents to be tried by the court without a jury. Plainly, such an exception is unauthorized by the Constitution if its words be interpreted according to their ordinary meaning. Nor, in my opinion, is it consistent with the fundamental rules of criminal procedure, as established and enforced at common law. In determining

the meaning and scope of the words "due process of law," as used in the Constitution, the established rule is that "we must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Murray* v. *Hoboken Land Co.*, 18 *How.* 272, 277. So, in ascertaining whether under any circumstances a criminal case may be *tried* in a Federal court without a jury—*the accused pleading not guilty*—we must inquire whether the Constitution forbids such an exercise of authority by the court, without a jury. If it does, that is the end of the matter; if it does not, then, and then only, may we look to such usages and modes of proceeding as existed at the common law for the trial of crimes before the adoption of the Constitution.

Proceeding on that basis, we have seen that the Constitution expressly requires that the trial of all crimes, except impeachment, shall be by jury; and I assert, with confidence, that no precedent can be found at common law for the trial by the court, without a jury, of any crimes except those described in adjudged cases and by elementary authorities as minor or petty offenses involved in the internal police of the State, and those could be tried summarily by some court or officer without the intervention of a jury *only* when thereunto authorized by an act of Parliament. Except in cases of contempt, the common law, Blackstone says, was a stranger to the summary proceedings authorized by acts of Parliament. *Bk.* 4, *c.* 20, 280. I am not aware of, nor has there been cited, any case in England in which, after *Magna Charta* and prior to the adoption of our Constitution, a court, tribunal, officer, or commissioner has, without a jury, even in the case of a petty offense, determined the question of crime or no crime, when the defendant pleaded not guilty, *unless the authority to do so was expressly conferred by an act of Parliament.* The exceptions to the rule at common law that all crimes must be tried by a jury were in the mind of this court when in *Callan* v. *Wilson*, 127 *U. S.* 540, 557, it said: "Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal *legally constituted for that purpose*, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void."

If, in analogy to the powers exercised by the Parliament of England prior to the adoption of our Constitution, it should be held that Congress

could treat the particular crime here in question as a petty offense triable by the court, without a jury, or with a jury of less than twelve persons, it is sufficient to say that Congress has not legislated to that effect in respect of the offense charged against these defendants, or of any other offense defined in the acts relating to oleomargarine. If it has the power to do so, Congress has not assumed, directly or indirectly, to withdraw such offenses from the operation of the constitutional provision that the trial of all crimes, except in cases of impeachment, *shall be* by jury. And the question is whether in the face of that explicit provision, and in the absence of any statute authorizing it to be done, the court, a jury being waived, had *jurisdiction* to try the accused for the crime charged.

In this connection we are confronted with the broad statement, found in some adjudged cases as well as in elementary treatises, to the effect that a person is entitled to waive *any* constitutional right, of whatever nature, that he possesses, and thereby preclude himself from invoking the authority of the Constitution for the protection or enforcement of that right. It is suggested that even when charged with murder he may plead guilty, and that the court thereupon without the intervention of a jury may pronounce such judgment as the law permits or authorizes. And it is confidently asked by those who make that suggestion, why may not one charged with a misdemeanor, and pleading not guilty, waive a jury altogether and consent to be tried by the court? This argument will not stand the test of reason. It proceeds upon the ground that jurisdiction to try a criminal case may be given by consent of the accused and the prosecutor. But such consent could have no legal efficacy. Undoubtedly one accused of murder may plead guilty. But in doing so he renders a trial unnecessary. The Constitution does not prohibit an accused from pleading guilty. His right to do so was recognized long before the adoption of that instrument; and it was never supposed that such a plea impaired the force of the requirement that a trial for crime, under a plea of not guilty, shall be by jury. It is not to be assumed that the Constitution intended, when preserving the right of trial by jury, to change any essential rule of criminal practice established at the common law, before the adoption of that instrument. When the accused pleads guilty before a lawful tribunal he admits every material fact well averred in the indictment or information, and there is no issue to be tried; no facts are to be found; no trial occurs. After such a plea nothing remains to be done except that the court shall pronounce judgment upon the facts voluntarily confessed by the accused. What the Constitution requires is that the *trial* of a crime shall be by jury. If the accused pleads not guilty, there must, of necessity, be a trial; for by that plea he puts "himself on his country, which country the jury are;" he contests, by that plea, every fact necessary to establish his guilt; he is presumed to be innocent; nothing is confessed;

and the facts necessary to show guilt must be judicially ascertained, in the mode prescribed by law, before any judgment can be rendered. But the vital inquiry is, in what way, when the defendant pleads not guilty, are the facts to be ascertained and the plea of not guilty overcome? Under the express words of the Constitution the answer must be: By trial before a jury of twelve persons organized to determine whether the charge of guilt be true; the function of the court being simply to conduct the trial and render a judgment in accordance with the verdict of the jury as to the facts. The court and the jury, not separately but *together*, constitute the appointed tribunal which alone, under the law, can *try* the question of crime, the commission of which by the accused is put in issue by a plea of not guilty.

There are some things so vital in their character that they may not be legally done or legally omitted in a criminal prosecution, even with the consent of the accused. This is abundantly established by authority. The grounds upon which the decisions rest are, upon principle, applicable alike in cases of felonies and misdemeanors, although the consequences to the accused may be more evident as well as more serious in the former than in the latter cases. Certain it is, that felonies and misdemeanors are equally crimes within the meaning of the constitutional provision that the trial of all crimes shall be by jury, and there is no warrant to construe that provision as if it read, "the trial of all crimes, except in cases of impeachment *and in misdemeanors*, shall be by jury."

Let us look at some of the authorities in cases both of felonies and misdemeanors, and ascertain whether the consent, express or of implied, the accused can have the effect to dispense with the mode of trial appointed by law for criminal cases. As the question here presented has never been decided by this court, and is of importance, a somewhat extended reference to authorities is justified.

The first case to which I call attention is *Hopt* v. *Utah*, 110 *U. S.* 574, 579. That was a case of murder, arising in Utah while a Terrritory. It appeared that the trial, by triers appointed by the court, of challenges of proposed jurors was not had in the presence of the accused. It was there argued that his presence at the trial of such an issue was a privilege which he was entitled to waive, and that the entire proceedings against him should not fail because he chose not to exercise that privilege. This court, however, held that the trial of challenges could not legally take place except in the actual presence of the accused. In dealing with the suggestion that the right of the accused to be present before the triers was waived by his failure to object to their retirement from the court room, or to the trial of the several challenges in his absence, it was said: "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the

trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 *Bl. Com.* 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. *That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused,* much less by his mere failure, when on trial and in custody, to object to unauthorized methods." 4 *Bl. Com.* 11.

In *Thompson* v. *Utah*, 170 *U. S.* 343, 353, which was a case of grand larceny charged to have been committed while Utah was a Territory, (the trial occurring after Utah became a State,) one of the questions was whether the trial by a jury composed of eight jurors, as authorized by the statutes of the State, was a legal trial for a crime committed when Utah was a Territory under the exclusive jurisdiction of the United States. It was contended that as the accused did not object, until after verdict, to a trial by a jury of eight persons, he should not be heard to say that the trial was in violation of his constitutional rights. This court overruled that contention, saying: "It is sufficient to say that it was not in the power of one accused of felony, *by consent expressly given* or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force, when this crime was committed, did not permit *any* tribunal to deprive him of his liberty, except one constituted of *a court and a jury of twelve persons.*" After referring to *Hopt* v. *Utah*, above cited, the court proceeded: "If one under trial for a felony the punishment of which is confinement in a penitentiary could not legally consent that the trial proceed in his absence, still less could he assent to be deprived of his liberty by *a tribunal not authorized by law to determine his guilt.*"

"The infirmity," says Cooley, "in case of a trial by a jury of less than twelve, by consent, would be that the *tribunal would be one unknown to the law, created by mere voluntary act of the parties;* and it would be in effect an attempt to submit to a species of arbitration the question whether the accused has been guilty of an offense against the State." *Const. Lim.* 319.

A leading case is that of *Cancemi* v. *People*, 18 *N. Y.* 128, 136. Its doctrines have been widely accepted as based upon a sound interpretation of constitutional provisions relating to criminal prosecutions. The Court of Appeals of New York said: "These considerations make it apparent that the right of a defendant in a criminal prosecution to affect, by consent,

the conduct of the case, should be much more limited than in civil actions. It should not be permitted to extend so far as to work radical changes in great and leading provisions as to the organization of the tribunals *or the mode of proceeding prescribed by the constitution and the laws.* Effect may justly and safely be given to such consent in many particulars; and the law does, in respect to various matters, regard and act upon it as valid. Objections to jurors may be waived; the court may be substituted for triers to dispose of challenges to jurors; secondary in place of primary evidence may be received; admissions of facts are allowed; and in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid, what without it would be erroneous. A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the nature and effect of it are understood by the accused. In such a case the preliminary investigation of a grand jury, with the admission of the accusation in the indictment, is supposed to be a sufficient safeguard to the public interests. *But when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant.* Applying the above reasoning to the present case, the conclusion necessarily follows that the consent of the plaintiff in error to the withdrawal of one juror, and that the remaining eleven might render a verdict, could not lawfully be recognized by the court, at the circuit, and was a nullity. If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the court alone. It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and we think it ought not to be tolerated."

Upon the general question whether the consent or silence of the defendant can excuse the failure of the court at the trial to enforce such essential rules as are prescribed by law for the trial of criminal cases, the case of *Hill* v. *People*, 16 *Mich.* 351, 356, 357, 358, is instructive. That was a case of murder. The defendant was found guilty, and after the trial it was covered that one of the jurors was disqualified under the statutes of Michigan. But that fact was unknown to the accused and his counsel until after the rendition of the verdict. It was contended by the State that by neglecting to challenge that juror, the accused lost the right to avail himself of the objection; and was to be deemed to have thereby waived all objections to the juror or to a trial by eleven qualified jurors. It

should be here observed that the Constitution of Michigan preserved the right, in all criminal prosecutions, to "a speedy and public trial by an impartial jury, which may consist of less than twelve men in all courts not of record." Looking at the case as one in which the trial had been by eleven competent jurors only, the court considered the general question of waiver as applicable to criminal cases. Speaking by Judge Christiancy, and observing that under the State constitution there could be no reasonable doubt of the competency of parties in civil cases to waive such an objection, or to stipulate for a trial by a jury of less than twelve, the court said: "But a criminal prosecution, in which the people in their sovereign capacity prosecute for a crime against the laws of the whole society, and seek to subject the defendant to punishment, must, it seems to us, be considered as a proceeding *in invitum*, against the will of the defendant throughout, so far as relates to a question of this kind, or any question as to the legal constitution of the court or jury by which he is to be tried. It would be adding materially to the generally recognized force of the obligation of contracts to hold that a defendant charged with a crime might, without a trial, enter into a binding contract with the prosecuting attorney (representing the State) to go to the penitentiary for a certain number of years in satisfaction for the offense. And yet it would approximate such a position, to hold that he might be bound by a contract providing for a trial before a court or jury unknown to the constitution or the laws, the result of which trial might be to place him in the same penitentiary. The true theory, we think, is that the people, in their political or sovereign capacity, *assume to provide by law the proper tribunals and modes of trial for offenses, without consulting the wishes of the defendant as such;* and upon them, therefore, devolves the responsibility, not only of enacting such laws, but of carrying them into effect, by furnishing the tribunals, the panels of jurors, and other safeguards for his trial, in accordance with the constitution, which secures his rights."

The court added some general observations which may well be heeded by every one charged with the administration of the criminal laws. It said: "But independent of all theories, and as a practical question, we think there would be great danger in holding it competent for a defendant in a criminal case, by waiver or stipulation, to give authority which it could not otherwise possess, to a jury of less than twelve men, for his trial and conviction; or to deprive himself in any way of the safeguards which the constitution has provided him, in the unanimous agreement of twelve men qualified to serve as jurors by the general laws of the land. Let it once be settled that a defendant may thus waive this constitutional right, and no one can see the extent of the evils which might follow; but the whole judicial history of the past must admonish us that very serious evils should be apprehended, and that every step taken in that direction would tend to increase the danger. One act or neglect might be recog-

nized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially frittered away. The only safe course is to meet the danger *in limine*, and prevent the first step in the wrong direction. It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction."

In *State* v. *Carman*, 63 *Iowa*, 130, 131, which was the case of an assault with an attempt to commit murder, the Supreme Court of Iowa said: "In our Code of Civil Practice it is provided that 'issues of fact in an action in an ordinary proceeding must be tried by a jury, unless the same is waived.' § 2740. In our Code of Criminal Procedure there is no provision for the waiver of a jury. On the other hand, it is provided that 'an issue of fact must be tried by a jury of the county in which the indictment is found, unless a change of venue has been awarded.' § 4350. *We regard this provision as excluding the jurisdicton of the court, without a jury, to try such issue.* The question presented is not as to the waiver of a mere statutory privilege, but an imperative provision based, as we view it, upon the soundest conception of public policy. Life and liberty are too sacred to be placed at the disposal of any one man, and always will be, so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safeguards. There is no resemblance between such a case and that of a person pleading guilty. In the latter case there is no trial, but mere judgment upon the plea. If the language of the statute were less imperative than it is, the adjudications would support us in reaching the same conclusion."

In *State* v. *Mansfield*, 41 *Mo.* 470, 476, which involved the question of the right of the accused in capital crimes and felonies to waive his right to a jury of twelve persons, after referring to *Cancemi* v. *People*, 18 *N. Y.* 128, the Supreme Court of Missouri, speaking by Judge Wagner, conceded that in cases of misdemeanor, *created by statute*, the *Legislature*, under the laws of that State, might provide for their prosecution in a summary way, without the formality of an indictment, and that the accused could waive a jury or agree on a certain number. But there was no such statute in Missouri, and the court, in respect of the general question of the waiver of a jury, said: "Another good and sufficient reason, it occurs to us, is, that the prisoner's consent cannot change the law. His right to be tried by a jury of twelve men is not a mere privilege; it is *a positive requirement of the law.* He can unquestionably waive many of his legal rights or privileges. He may agree to certain facts and dispense with formal proofs; he may consent to the introduction of evidence not strictly legal, or forbear to interpose chal-

lenges to the jurors; *but he has no power to consent to the creation of a new tribunal unknown to the law to try his offense.* The law in its wisdom has declared what shall be a legal jury in the trial of criminal case; that it shall be composed of twelve; and *a defendant, when he is upon trial, cannot be permitted to change the law, and substitute another and a different tribunal to pass upon his guilt or innocence.* The law as to criminal trials should be based upon fixed standards, and should be clear, definite, uniform, and absolute. If one juror can be withdrawn, there is no reason why six or eight may not be, and thus the accused through persuasion or other causes may have his life put in jeopardy, or be deprived of his liberty, through a body constituted in a manner unknown to the law. Aside from the illegality of such a procedure, public policy condemns it. The prisoner is not in a condition to exercise a free and independent choice without often creating prejudice against him."

In *Wilson* v. *State,* 16 *Ark.* 601, 608, which was a case of larceny, the Supreme Court of Arkansas said: "Hence there would seem to be no other mode for the trial of a criminal issue, than that by jury. The difficulty is not obviated by any *waiver* of this mode of trial, *because the Legislature has provided no other mode, in lieu of it, in such an event, as it has in civil cases. Nothing short of a confession of the facts, or the finding of them by the verdict of the jury, can regularly authorize the judgment of the court.* If the accused would not only waive his right to a trial by jury, but go further, and withdraw his plea, and then confess the facts charged against him in the indictment, the court would be authorized to render a judgment against him; but *so long as his plea of not guilty is in, there is no mode by which the court can dispose of it, although the accused may waive a trial by jury, with all its attendant privileges, and desire ever so much that the issue may be disposed of by a reference of it to the judge,* or any other referee or arbitrator, and the prosecuting attorney may desire the same, and act in concert with the accused; for the simple reason that the law makes no provision for any such referee or arbitrator in criminal cases. The only provision is for a confession of the facts, or a trial by jury to determine them."

A leading case upon the subject of trial by jury is that of *Work* v. *State of Ohio,* 2 *O. St.* 296, 302, 305. That was an information charging the defendant with assault and battery. The trial took place under an act of the Ohio legislature which permitted a trial in such a case by a jury of six men, notwithstanding the Constitution of Ohio provided that the right of trial by jury should be inviolate. The defendant pleaded not guilty, but was found guilty and sentenced to pay a fine of $100 and costs. In discussing the history of trial by jury, the court, speaking by Judge Ranney, said: "In what does the privilege of this great bulwark of personal liberty consist? The constitution furnishes no answer, nor was it neces-

sary that it should. If ages of uninterrupted use can give significance to language, the right of jury trial and the *habeas corpus* stand as representatives of ideas as certain and definite as any other in the whole range of legal learning. The institution of the jury, referred to in our constitution, and its benefits secured to every person accused of crime, is precisely the same in every substantial respect, as that recognized in the great charter, and its benefits secured to the freemen of England, and again and again acknowledged in fundamental compacts as the great safeguard of life, liberty, and property: The same, brought to this continent by our forefathers, and perseveringly claimed as their birthright, in every contest with arbitrary power, and finally, an invasion of its privileges prominently assigned as one of the causes which was to justify them in the eyes of mankind in waging the contest which resulted in independence. . . We are of opinion it was this very tribunal, thus constituted, that those who framed and adopted the constitution of this State intended to perpetuate, and make the safeguard of innocence, by securing its benefits to every person accused of crime, in any of its courts. There is certainly nothing in our history which points to a different conclusion. For half a century before its adoption, similar provisions had been so considered and acted upon. Until the passage of this law, *no person had ever been convicted of crime, by less than the concurring assent of twelve of his peers; and no law had ever attempted to authorize it to be done.* If the power exists to diminish the number of the jury, it may be applied to all cases, and it may be reduced to two as well as to six. *The same constitutional provision that secures the right in a charge involving the life of the accused, secures it also in every other criminal case.* It is no answer to say that this would not likely be done. If it had been deemed safe to leave it to the discretion of the General Assembly, no constitutional provision was needed; but, whether needed or not, it has been ordained by a power which both the General Assembly and this court are bound to obey." Again: "But, without pursuing these considerations further, our opinion is, that the essential and distinguishing features of the trial by jury as known at the common law, and generally, if not universally, adopted in this country, were intended to be preserved, and its benefits secured to the accused in all criminal cases, by the constitutional provision referred to. That it is beyond the power of the General Assembly to impair the right, or materially change its character; that the number of jurors cannot be diminished, or a verdict authorized short of a unanimous concurrence of all the jurors. It follows that the act under which this conviction was obtained, in so far as it provides for a jury of six only, and authorizes a conviction upon their finding, is unconstitutional and void."

In *United States* v. *Taylor*, 11 *Fed. Rep.* 470, which was a criminal prosecution by information for the offense of carrying on the business of a

retail dealer in liquors without having paid the special taxes required by law, the main question was as to the authority of the court to direct a verdict of guilty under the evidence. It was held by Judge McCrary that no such power existed in the court. In the course of his opinion he said that the constitutional guaranty of a jury in a criminal case was a right that *could not be waived, and that such a trial before the court by the prisoner's consent was erroneous.* It appears from the report of that case that Mr. Justice Miller was consulted by Judge McCrary and concurred in the latter's views.

Among the cases cited by Judge McCrary was *State* v. *Maine*, 27 *Conn.* 281, which was a criminal information for placing a nuisance in a highway. The defendant pleaded not guilty. The case, *by agreement of the parties*, was tried by the court, which found the facts, and reserved the questions of law arising thereon for the advice of the Supreme Court of Errors. The judges of the latter court unanimously held that, "*as no statute conferred on the superior court the power to try this or any other criminal charge, excepting through the intervention of a jury*, the court below could not legally try the case in the manner in which it had done, and would not be able to render a legal judgment on the facts, if the advice of this court was given upon them. They therefore refused to entertain the case."

In *Neales* v. *The State*, 10 *Mo.* 314, which is an indictment for unlawfully carrying on the business of a dram-shop keeper without having a license therefor, it appears that the defendant pleaded not guilty, and *neither party requiring a jury*, the case was submitted to the court, who found him guilty and assessed a fine of $30 against him. The Supreme Court of Missouri, in which State there was a constitutional provision providing that the right of trial by jury should remain inviolate, said: "Another objection, equally fatal to the judgment, was the trial of the cause by the court, on the plea of not guilty. It has heretofore been virtually decided by this court, in two cases, that unless the defendant pleads guilty to the charge contained in the indictment, the court cannot try the issue and assess a fine against him. 6 *Mo.* 457; 9 *Mo.* 696. It is exclusively the province of a jury to *try the issue of not guilty*, and *the consent of the defendant for the court to try the same cannot confer such power upon the court.*"

A case directly in point is that of *State* v. *Stewart*, 89 *N. C.* 563, 564. That was an indictment for an assault and battery. The defendant pleaded not guilty. A jury trial was *waived*, the court found the facts and adjudged the accused guilty. The judgment was arrested and the State appealed. The Supreme Court of North Carolina said: "It is a fundamental principle of the common law, declared in '*Magna Charta*,' and again

in our Bill of Rights, that 'no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court.' *Art. I*, § 13. The only exception to this is *where the Legislature may provide other means of trial for petty misdemeanors* with the right of appeal —Proviso in same section. *This is not one of the petty misdemeanors embraced in the proviso;* and if it was, *no such means of trial as that adopted in this case has been provided by the legislature. The court here has undertaken to serve in the double capacity of judge and jury, and try the defendant without a jury, which it had no authority to do, even with the consent of the prisoner.*"

Later, in *State* v. *Holt*, 90 *N. C.* 749, 754—which was an indictment for cruelty to animals—the same court, after observing that it was the province and duty of the judiciary to watch over and protect the fundamental rights, in all matters that come before them, said: "There was not the remotest purpose in this case, we are sure, to infringe the right of trial by jury in a criminal action, but for convenience sake and to save time (because the facts were not disputed) the facts of the case were agreed upon by the State and the defendant, and submitted to the judge, instead of letting a jury hear the evidence, and render a verdict upon the issue, or find a special verdict. In our judgment, this was not only irregular, but wholly without the sanction of law. *There is no statute that authorizes such procedure,* and the Constitution forbids it. 'No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court.' No jury was empaneled to try the issue; there was no verdict of a jury; there was no conviction. The judgment of the court had nothing to warrant it, and there was nothing upon which it could properly rest. *The defendant could not consent to a conviction by the court. It had no authority to try the issue of fact raised by the pleadings.* The defendant did not plead guilty; he did not enter the plea of *nolo contendere*, or submit; he pleaded *autrefois convict*, and a jury must try the issue raised by that plea. *State* v. *Stewart*, 89 *N. C.* 563; *State* v. *Moss*, 2 *Jones*, 66; 1 *Bish. Cr. Pl.* § 759, *and cases there cited; Cancemi* v. *People*, 18 *N. Y.* 128. *The legislature has not provided a means for the trial of cases like this, different from the ordinary method provided by law.* The court erred in passing upon the facts agreed upon and submitted to it without the finding of a jury, and for such error the judgment must be reversed and the court proceed to dispose of the case according to law."

Running through the adjudged cases is the thought that the facts necessary to be proved in order to sustain the charge of crime, where the plea is not guilty, must be ascertained in the mode ordained by law for such purpose. "When, therefore," says Blackstone, "a prisoner on his arraignment pleads not guilty, and for his trial hath put himself on his country, which country

the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto.*" *Bk.* 4, *c.* 27, *350. Now, all will agree that when the crime charged is a felony, a trial in a Circuit or District Court of the United States, even with the consent of the accused, without a jury composed of twelve persons, would be unauthorized and unavailing for any legal purpose. Why? Because, and only because, the law, the supreme law of the land, has declared that the trial of all crimes shall be by jury. And, perhaps, all will agree that the constitutional injunction applies with like force to such misdemeanors as by statute are punishable with imprisonment, and that a Circuit or District Court of the United States is without jurisdiction, under a plea of not guilty, no jury being impaneled, to try any crime against the United States involving *life* or *liberty*. The consent of the accused in such a case certainly cannot confer upon the court authority to try the crime in a mode inconsistent with the one prescribed by the law.

In my judgment, the same principle must apply in the present case, although a fine only can be imposed. The case is embraced by the very words of the Constitution; for the offense charged is a crime—none the less a crime because only a fine is involved—and the constitutional mandate is that the trial of all crimes, except impeachment, shall be by jury. By what authority can a Federal court except from the operation of the constitutional mandate a crime punishable by fine? It is said that only the property of the accused can be affected, and, therefore, to his consent in this criminal case should be accorded the same effect as is given to his consent in a purely civil case to which he might be a party, and which involved no element of crime. In this view I cannot concur. Something more than property is involved in a criminal case, although the penalty imposed may be simply a fine. Whether the accused has violated the laws of his country and whether he shall be branded by the judgment of a court as a criminal is a thing of more consequence to the public than property the value of which is to be measured in money. What shall constitute a crime, how that crime shall be tried, and in what way the guilt of the accused shall be manifested, when he pleads not guilty, are exclusively for the Government to declare and regulate, and it is not for the accused, and the prosecutor, by the device of an agreement between them, to evade the requirements of the Constitution and provide a tribunal for the determination of the issue of crime or no crime different from that designated by the law. Crime or no crime, if the plea be not guilty, can be established in a court of the United States only by the verdict of a jury.

Undoubtedly, as already indicated, there were petty or minor crimes which, at common law, could be tried without a jury, and it may be assumed for the purposes of this case, that the constitutional provision that all crimes

except impeachment shall be tried by jury is to be interpreted in the light of that fact. But, it may be repeated, that the trial, even of such cases, without a jury, was contrary to the genius of the common law, and was allowed by the courts *only in obedience to acts of Parliament*, which was not bound by a written constitution, and whose authority in matters of legislation was omnipotent, and, therefore, not to be disputed by any English court. An enumeration of all the crimes against the United States which may be reasonably declared to belong to the class known at the common law as petty offenses, punishable *under legislative sanction* without the intervention of a jury, need not here be attempted. Nor is it necessary to express any final judgment upon the question whether the particular crime here involved might, *by statute*, be placed in that class and tried without a jury. It is enough to say that even if Congress could place it in that class, and authorize its trial by summary proceedings, without a jury, or with a jury of less than twelve, it has not done so. The case, therefore, is controlled by the express constitutional injunction that all crimes, except in cases of impeachment, shall *be* tried by a jury. The agreement of the accused and the prosecutor cannot confer jurisdiction, much less have the effect to displace the mode of trial established by the fundamental law and substitute for it one inconsistent with the principles of the common law as unmodified by any valid statute.

It is said that the nature of the offense and the amount of punishment prescribed must determine whether it is to be classed among serious or petty offenses. This, I take it, means that it is for the court, in the exercise of its inherent powers, to determine whether the offense is a serious one to be tried alone by a jury, or a petty one which may be tried without a jury. But the judiciary had no such function at common law. No court at common law assumed, without a jury, to try any offense, however trivial or petty, except under the authority of a statute conferring authority to that end. If the offense is punishable only by a fine of fifty dollars—as is the case here—is it to be deemed a petty offense, and yet is one punishable by a fine of five hundred dollars to be deemed a serious one? Must there not be some fixed rule or limit on the subject? In my judgment, the Constitution establishes a rule which must be respected by every branch of the Government. Yet, under the principles now announced, an offense punishable by a fine of five or ten thousand dollars may be regarded—if the court so wills—as a petty offense, triable without a jury. I cannot understand where the judiciary derives its authority to prescribe any rule on the subject, in face of the absolute constitutional requirement that all crimes, except in cases of impeachment, shall be tried by a jury, and in face of the further significant fact that no court at common law ever assumed to regard *any* crime, however trivial, as triable without a jury, except under express legislative sanction.

Again, it is said that in the original draft of the Constitution the words were "the trial of all criminal offenses . . shall be by jury," and that these words were changed in the Convention so as to read "the trial of all crimes." Strangely enough, it is supposed that this change of words justifies the conclusion that the framers of the Constitution intended to dispense with a jury in such criminal offenses as the courts, uncontrolled by statute, deemed petty as contrasted with those that they deemed serious. To say that "crimes" means something different from "criminal offenses" is something that I cannot comprehend. A crime is a criminal offense and a criminal offense is a crime. But the contention of the prosecution, even if sound, does not answer the suggestion that, at common law, it was never the province of a court, by any inherent power it possessed, to prescribe what criminal offenses or crimes were triable, and what need not be tried, by jury. My point is that no criminal offense or crime against the United States can be tried except by jury, if the plea be not guilty, unless it be a petty offense or crime, *and* unless the legislative department declares that it may be so tried. If the offense or crime be, in reality, in its essence, a petty one, then Congress may authorize it to be tried without a jury. But Congress has not so declared in respect of the offense or crime charged against the present defendant. The trial by jury is not one of form, but of the very substance of the mode prescribed for the trial of crimes. It may not be waived merely by the consent of the accused and the prosecutor. In the present case the court, as I think, entrenches upon the domain of the legislative department of the Government. It assumes, without authority, to prescribe a rule of criminal procedure which Congress has not, in its wisdom, undertaken to prescribe. It has made, not declared, law. There is no tendency, in these latter days, more dangerous than the assumption by one department of the Government of powers that belong to another department.

It is contended that this mode of trial, at least in misdemeanors involving only a fine, ought to be sanctioned—indeed, encouraged—as convenient both for the Government and the accused. What was said by Blackstone when referring to summary proceedings authorized by acts of Parliament in particular cases may well be repeated, at this day, whenever it is proposed, upon grounds of convenience, to dispense with juries in criminal prosecutions, and thereby introduce a new mode for the trial of crimes. He said: "And, however *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that though begun in trifles, the precedent may gradually increase and spread, to the

utter disuse of juries in questions of the most momentous concern." *Bk.* 4, *c.* 27, 350.

I insist that as the offense charged in each of these cases was a crime against the United States; as the Constitution expressly declares, without qualification, that the trial of all crimes, except impeachment, shall be by jury; as Congress has not assumed to declare that this case and like ones may be tried without a jury, the parties assenting; and as the trial of these cases by the court alone, without a jury, has no other sanction than the consent of the accused and the District Attorney, the judgment in each case should be reversed, and each case remanded with directions to set aside the judgment, grant a new trial, and take such further proceedings as may be in conformity with law.

True copy.

Test:

Clerk Supreme Court, U. S.